



# **2004**

# **Annual Report**

**Attorney General of Washington**

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## **To the Citizens of Washington State:**

*It is my pleasure to present the Office of the Attorney General's Annual Report for 2004.*

*This report summarizes many of the major cases and issues the Attorney General's office has handled over the past year and highlights some of the accomplishments of the office's dedicated, outstanding and committed public employees.*



*The Attorney General's Office has worked hard on issues ranging from protecting consumers and the state's most vulnerable citizens to helping preserve Washington's precious natural resources. The office serves clients in more than 230 state agencies, boards and commissions, as well as the state's community colleges and universities.*

*I believe the Attorney General's Office is one of the finest law firms in the state and I am proud of the work we do every day to make Washington a wonderful place to live.*

*I am grateful for the opportunity to present my final annual report to you. It has been an honor to represent the State of Washington and its citizens as the Attorney General for the past 12 years.*

*Sincerely,*

A handwritten signature in blue ink that reads "Christine O. Gregoire". The signature is fluid and cursive, with the first name "Christine" and last name "Gregoire" clearly visible.

Christine O. Gregoire  
Attorney General of Washington





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# Solicitor General Team



## Summary of Responsibility

The Solicitor General Team was created in 1993. Its role is to provide the following services:

- Coordinate cases at the appellate levels in both state and federal courts, and conduct appellate assistance and review programs for the Attorney General's Office;
- Coordinate the office's involvement with cases in the U. S. Supreme Court;
- Be primarily responsible for the preparation of formal Attorney General Opinions;
- Coordinate the office's involvement with amicus curiae "Friend of the Court" briefs in all courts;
- Carry out the Attorney General's duties with respect to the preparation of ballot titles and explanatory statements, and represent the state in litigation involving the powers of initiative and referendum;
- Coordinate legal advice on issues of statewide significance;
- Chair the Ethics Committee, the office's primary resource on matters of professional responsibility;
- Serve as the office's liaison to the state bar association;
- Serve as legal counsel to the Secretary of State, Lieutenant Governor, and the Administrator for the Courts.

## Legal Services Provided

A large part of the team's role is consulting with other divisions of the office concerning appellate practice, or coordinating the office's client advice on issues of statewide significance. The team has primary or exclusive responsibility for several major cases, and a secondary role in dozens of others. The Solicitor General Team also provides a great deal of legal advice through the preparation of formal opinions and interpretative memoranda, consultation with other divisions, or directly to agencies.

## Solicitor General Team

**During the same period, the office cleared 35 opinions. Four formal opinions were issued on subjects as diverse as the applicability of campaign contribution limitations to the office of prosecuting attorney and the extent to which a housing authority may contract to perform services in other states.**

### Numbers/Trends

- The team received notice of 337 new appeals and formally consulted 409 times with other divisions concerning appeal questions or other strategies.
- The team arranged conferences with the Attorney General in 17 cases before the State Supreme Court.
- The team coordinated practice arguments in 76 appellate cases.
- Between December 1, 2003, and November 30, 2004, the office received 48 opinion requests for processing. Twenty-nine were accepted. Nineteen requests were rejected because the requests involved matters in litigation or were not within the scope of the statute on Attorney General Opinions. During the same period, the office cleared 35 opinions. Four formal opinions were issued on subjects as diverse as the applicability of campaign contribution limitations to the office of prosecuting attorney and the extent to which a housing authority may contract to perform services in other states. Twenty-eight were issued as informal opinions on a wide variety of topics. Three opinion requests were handled by a general letter but not by a written opinion.
- Between December 1, 2003, and November 30, 2004, the team reviewed 111 requests for participation as amicus curiae or "Friend of the Court." Of the 111 requests, the office joined or authored 42 briefs. Five briefs supported petitions for certiorari to the U.S. Supreme Court and nine briefed the merits of cases accepted by the U.S. Supreme Court. The office was the sole or primary author of 17 amicus briefs filed in various courts.
- Between December 1, 2003 and November 30, 2004, members of the team processed ballot measure titles for 40 initiatives to the people, 24 initiatives to the Legislature, and four referendum measures. Eighteen ballot titles were appealed to the Superior Court. Five measures were certified for the 2004 general election and explanatory statements for the Voters Pamphlet were provided.

### Significant Cases and Issues

- **Prohibition Against Funding Religious Instruction:** Article I, section 11 of the Washington Constitution prohibits appropriating or applying public funds for religious instruction. The Legislature has authorized college scholarships for low-income students in the top 15 percent of their graduating class. Applying the prohibition in Article I, section 11, the Legislature provided that the scholarship may not be used to pursue a degree in theology. This restriction was challenged by a student who met the income and academic requirements of the scholarship, but who was seeking a degree in theology. The U.S. District Court ruled in favor of the state but the Ninth Circuit Court of Appeals reversed the decision.



## Solicitor General Team

The Ninth Circuit ruled that the restriction on the scholarship violated the Free Exercise Clause of the United States Constitution. Members of the Solicitor General's Team worked with attorneys in the Education Division to prepare a petition for a writ of certiorari for the U.S. Supreme Court. The court granted the petition and the team prepared the briefs on the merits. The Solicitor General argued the case. In a 7-2 decision authored by Chief Justice Rehnquist, the Supreme Court reversed the Ninth Circuit and upheld the prohibition on granting state scholarships to obtain a theology degree. The court held that the Free Exercise Clause does not prohibit states from having different constitutional limits on the separation of church and state that preclude state funding for pursuing degrees in devotional theology.

**Blanket Primary:** From 1936 through 2003 Washington used a system known as the "blanket primary" as a means of qualifying candidates for elected office to the general election ballot. Under this system, voters could vote for any candidate of their choice at the primary, without limitation based on party affiliation. In 2000, the U.S. Supreme Court ruled that California could not continue to use that state's blanket primary system over the objection of the political parties. Political parties filed a lawsuit against the Secretary of State in federal court in Washington, challenging the continued use of the blanket primary in this state. The U.S. District Court granted summary judgment in favor of the state and upheld the blanket primary. In September 2003, the U. S. Court of Appeals for the Ninth Circuit reversed, holding that Washington could not constitutionally continue using the blanket primary. The appellate court later denied requests for the full court to rehear the case and the U.S. Supreme Court declined to hear the case. Attorneys from the Solicitor General Team and the Attorney General's complex litigation unit defended the lawsuit.

As a result of a 2004 enactment, Washington conducted a "Montana-style" open primary in September 2004. After enactment of the 2004 law that established the open primary system, an original action was brought in the Washington Supreme Court by the Washington State Grange and individual legislators. They asked the court to nullify the Governor's veto of sections of the bill as enacted into law, or alternatively to nullify the sections that remained after the Governor's exercise of his veto. They claimed the Governor exceeded his veto power and that the legislature violated various constitutional provisions in passage of the bill. The Solicitor General represented the Governor. The Washington Supreme Court heard the case on an expedited basis, denied the relief requested in the challenge, and indicated a written opinion will follow.

At the November 2004 general election, the voters adopted Initiative 872, establishing a "top two" primary for use in future years.

**Voting Rights of Convicted Felons:** The Washington Constitution makes convicted felons ineligible to register and vote until their civil rights have been restored upon completion of their sentences. A group of convicted felons filed suit in federal court, alleging that this restriction conflicts with the federal Voting Rights Act. A member of the Solicitor General's Team, along with an attorney in the Criminal Justice Division, defended the state's constitutional provision. In December 2000, a federal judge ruled that

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## Solicitor General Team

**The Solicitor General Team, working with attorneys from the Social and Health Services Division, defended a challenge to the Department of Social and Health Services' (DSHS) use of social security benefits to pay for a child's foster care.**

- the state's provision is legal and does not conflict with federal law. In July 2003, the U. S. Court of Appeals for the Ninth Circuit reversed and entered a decision returning the case to the District Court for further consideration of whether the Voting Rights Act requires the state to permit felons to vote.
- The state's request that the full appellate court reconsider that decision was denied. Members of the Solicitor General's Team assisted in the preparation of a petition for certiorari to the U. S. Supreme Court. The petition has been denied, and the case has been returned to the U.S. District Court in Spokane for further proceedings.
- A second case on a related subject was filed in King County Superior Court in October 2004. Plaintiffs in that case consist of convicted felons who have completed all of the terms and conditions of their felony sentences except for the payment of legal/financial obligations. These plaintiffs allege that it is unconstitutional for the state to deny them the right to vote when their only remaining obligations are financial in nature.
- **Election Reform:** After the 2000 Presidential election, Congress passed a new federal law that changes, in some ways, the method for conducting future elections. Known as the Help America Vote Act, or "HAVA", the new law also provides federal funds to partially pay for the costs of modernizing the voting systems used to conduct future elections. An attorney from the Solicitor General's Team is working with the Office of the Secretary of State to provide legal advice as they implement this new federal law. This included providing assistance in developing a state plan for implementation, and advising the Secretary as to the interpretation of the new law and of state legislation implementing it. Some elements of the new law do not take effect until 2006, and further legal advice is likely to be necessary as implementation continues.
- **Use Of Social Security Benefits To Pay For Foster Care:** The Solicitor General Team, working with attorneys from the Social and Health Services Division, defended a challenge to the Department of Social and Health Services' (DSHS) use of social security benefits to pay for a child's foster care. When a child is declared dependent and placed in foster care with DSHS, the department applies for social security benefits on behalf of the child. If DSHS is appointed by the Social Security Administration as the child's representative payee, it may use the benefits to pay for the cost of the child's foster care in accordance with the rules of the Social Security Administration. The Washington Supreme Court ruled that it was improper for the department to use benefits to pay for the cost of care. The U.S. Supreme Court issued a stay and granted DSHS's petition for a writ of certiorari. Attorney General Gregoire argued the case in December 2002. In February 2003, the U.S. Supreme Court unanimously reversed the Washington Supreme Court. The U.S. Supreme Court ruled the social security statutes and regulations authorize DSHS to use a child's social security benefits to help pay for the cost of the child's care. The case was remanded to the Washington Supreme Court to resolve two constitutional issues that had not been previously addressed. A member of the Solicitor General's Team, working with attorneys from the Social and Health Services Division briefed the constitutional issues and reargued the case to the Washington Supreme Court. The Washington Supreme Court reversed the trial court and rejected Keffeler's constitutional arguments.

## Solicitor General Team

**Petition Method of Annexation:** In *Grant County Fire Protection District v. Moses Lake*, the fire protection district challenged the constitutionality of the petition method of annexation. The Supreme Court issued a decision ruling that the petition method violated Article I, section 12 of the Washington Constitution. The Supreme Court subsequently granted reargument and a member of the Solicitor General's Team wrote an amicus brief, on behalf of the Governor, arguing that if the court adhered to its original decision, it should be applied prospectively. The cities granted a member of the Solicitor General's Team part of their time for oral argument to make this point to the court. After rearguments, the Washington Supreme Court reversed its decision and held that the petition method of annexation did not violate Article I, section 12.

**Initiative 776:** In November of 2002, the people enacted Initiative 776, which repealed certain local-option motor vehicle taxes and fees. Shortly after the election, two of the counties which had imposed these fees, joined by a city and several individuals, challenged the constitutionality of the initiative on several grounds. In January 2003, the King County Superior Court declared the initiative unconstitutional on grounds that it violated the "double subject" prohibition in the state constitution and that it would impair King County's bond obligations. The case was appealed to the State Supreme Court, which issued an opinion in October 2003, reversing the Superior Court and upholding the constitutionality of Initiative 776. Motions for reconsideration resulted in a slightly changed opinion issued in March of 2004. The remaining issues in the case have been remanded to the Superior Court, which ruled that Initiative 776 cannot be fully implemented within the district served by Sound Transit (a regional transportation authority) without impairing Sound Transit's bond obligations. A motion for reconsideration is pending. A member of the Solicitor General's Team worked with two attorneys from the Licensing and Administrative Law Division to defend the initiative.

**Child Pornography:** A member of the Solicitor General's Team defended a challenge to the constitutionality of RCW 9.68A, which prohibits child pornography. The U.S. District Court entered summary judgment in favor of the state and upheld the law. The plaintiff appealed the decision to the Ninth Circuit Court of Appeals. The case has been briefed and is awaiting oral argument.

**Probable Cause To Arrest:** Members of the Solicitor General's Team assisted attorneys in the Torts Division in preparing a petition for a writ of certiorari and merits briefing for the U.S. Supreme Court in a section 1983 action for false arrest. In this case state patrol troopers arrested the plaintiff for one offense. The troopers also had probable cause to arrest for a second offense, but did not articulate this as the basis for the arrest. The question presented is whether an arrest is valid under the Fourth Amendment when it turns out that the offense stated by the arresting officer is unfounded, but the facts known to the officer objectively establish probable cause for a different offense. The Ninth Circuit ruled the second offense must be "closely related" to the stated grounds for the arrest in order to make the arrest valid. The office argued this "closely related offense" doctrine conflicts with Fourth Amendment principles of judging the validity of the arrest by the

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# **Protecting Consumers and Legitimate Businesses**

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# Antitrust Division

**The Duke Energy settlement will result in a \$3.25 million payment to Washington. This brings the energy case settlements to a total of over \$39 million, which will be used to benefit residential and business customers of utilities injured during the energy crisis of 2000-2001.**

## ● Summary of Responsibility

- The Antitrust Division enforces state and federal laws protecting consumers and businesses from anticompetitive practices such as price-fixing,
- bid rigging, monopolization and other conduct that interferes with fair competition. The division also is charged with enforcing the Tobacco Master Settlement Agreement and helping the Insurance Commissioner to review insurance companies' conversions to for-profit status.

## ● Legal Services Provided

- The majority of the division's work focuses on representing consumers and state agencies in litigation seeking redress for violations of antitrust
- laws. The division also provides legal counsel to state agencies concerning antitrust-related matters.

## ● Numbers/Trends

- The Duke Energy settlement will result in a \$3.25 million payment to Washington. This brings the energy case settlements to a total of over \$39
- million, which will be used to benefit residential and business customers of utilities injured during the energy crisis of 2000-2001.
- Pharmaceutical industry litigation resulted in restitution of \$1.2 million in cash to consumers, approximately \$3 million to state agencies and the opportunity for additional free drugs for low income consumers. A further
- \$492,000 restitution distribution awaits conclusion of an appeal and another \$265,000 awaits court approval.
- The Compact Discs litigation was concluded when 213,000 Washington
- music CD purchasers received restitution checks totaling \$2,930,880 and Washington schools and libraries received 115,000 music CDs.
- The state received \$10,000 as its part of a settlement with children's
- generic liquid solution ibuprofen manufacturers. The money was directed to the Odessa Brown Clinic, which is part of Children's Hospital's low income
- assistance program.
- Approximately \$165,000 was distributed to eight charities, for nutritional and educational programs, as a result of the 2003 settlement with Salton,
- the maker of George Foreman grills.



## Antitrust Division

### Significant Cases and Their Impact

#### Pharmaceutical Cases

**Buspirone Antitrust Litigation:** This action alleged that Bristol Myers Squibb, the maker of a leading anti-anxiety medication, fraudulently obtained a patent on a drug, thereby preventing generic manufacturers from entering the market. BMS paid \$41.7 million nationwide in consumer restitution. In Washington we received a total of \$3,065,753 for restitution, including \$2,127,845 for state agencies and \$937,908 in cash for 1,155 consumers.

**Taxol Litigation:** Bristol Myers Squibb allegedly obtained a patent on a drug, by withholding key information from the patent office which would have shown the drug was not legally patentable. This patent prevented generics from entering the market. BMS ultimately agreed to pay the states \$52 million in damages and restitution, plus contribute another \$7.5 million in free drugs to low income cancer patients. In Washington, we received a total of \$1,263,700 for restitution, including \$920,041 to agencies and \$343,659 cash going to 591 consumers. We do not yet know how many Washingtonians will benefit from the free Taxol program.

**Cardizem CD Antitrust Litigation:** This action alleged that a brand name manufacturer of a heart medication paid a generic manufacturer to keep the generic off the market. The defendants, Aventis and Andrx, agreed to pay the states \$25 million for consumer restitution, plus damages for state agencies. Claims were filed by 1,188 Washington consumers who should receive total payments of approximately \$366,000 and state agencies will receive about \$126,000. The case was settled in 2003. However, an appeal in the Sixth Circuit is pending and the appellant also recently filed a motion to return the case to state court.

**Remeron Antitrust Litigation:** This multistate action alleged that Organon misled the FDA regarding the scope of its patent and that Organon delayed the listing of the patent, thereby delaying the introduction of generic competitors. If approved by the court, the settlement will provide \$7.5 million to consumers nationally and \$3.8 million to state agencies. Washington's agencies will receive approximately \$90,000 and consumers \$175,000. The case is *State of Texas, et al., v. Organon USA Inc. and Akzo Nobel N.V.*

#### Energy Settlements

**Duke:** Duke Energy has agreed to settle claims with several California parties, Washington and Oregon. Washington's portion is \$3.25 million. It will be added to the restitution funds created by the Williams and El Paso settlements.

The Seattle Foundation administered the \$13.4 million consumer portion of the energy settlement restitution fund. In September, it awarded 24 grants, including grants for low income energy assistance, weatherization and energy efficiency programs.

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## Antitrust Division

- A blue ribbon committee of legislators, industry experts and business leaders determined that the immediate income from the commercial and industrial portion of the energy settlements, approximately \$10 million, should be directed toward direct refunds to business customers. Local utilities have agreed to facilitate the distribution in 2005. The committee has yet to determine how the smaller, yearly payments from El Paso will be used, but it will be for a use designed to benefit business customers statewide.

- **Litigation:**

- **Enron:** The division continues to pursue a claim against Enron in bankruptcy court. Documents were requested and received from the Federal Energy Regulatory Commission and are being reviewed. Enron has indicated it will object to all states' claims based on recent federal cases holding that FERC has exclusive jurisdiction over rates and rate-related issues.

- **Tobacco:** Enforcement of the Master Settlement Agreement continues. In 2004, Washington exercised its leadership role by:

- - participating in Tobacco Enforcement Working Group discussions of numerous enforcement issues including those raised by so-called "reduced risk" advertising;
- - drafting and circulating AG sign-on letters in support of congressional legislation to ban internet sale of untaxed cigarettes and to direct the FDA to regulate tobacco;
- - participating in multistate deliberations, efforts to resolve difficult economic issues related to the Master Settlement Agreement, and strategy sessions related to litigation over the MSA and implementing legislation; and
- - making presentations on reduced risk advertising to the Triennial MSA Conference and the National Association of Attorneys General Tobacco Issues Seminar.

- **Premiera:** At the request of the Insurance Commissioner, a special assistant for the division reviewed the competition aspects of Premiera's request to convert to a for-profit entity. A professor from the University of Washington was retained as an economic expert to assist in that review. After hearing the professor and others' testimony, the Insurance Commissioner denied Premiera's request for conversion. Premiera has appealed.

- **Clark County Lawyers:** The division filed suit against certain criminal defense attorneys for engaging in joint bargaining while still remaining as independent businesses. The attorneys agreed to modify their negotiating tactics and to provide a certain amount of pro bono legal services.

- **Gasoline Prices:** The division maintains a website that provides useful information to consumers about gasoline prices. During 2004, primarily due to record high crude oil prices, political unrest globally and high demand, consumers paid record high prices for gasoline. During the

## Antitrust Division

summer, meetings were held with all major oil companies doing business in Washington, to discuss local market conditions and review information for evidence of price-fixing or collusion.

# Consumer Protection Division

**The division investigates and files legal actions to stop unfair, fraudulent and deceptive acts or practices, recovers refunds for consumers, and imposes penalties on offending businesses, as well as recovers attorneys' fees and costs incurred in taking such actions.**

## ● Summary of Responsibility

- The Consumer Protection Division enforces consumer protection laws to help keep the Washington marketplace free of unfair and deceptive practices.
- The division investigates and files legal actions to stop unfair, fraudulent and deceptive acts or practices, recovers refunds for consumers, and imposes penalties on offending businesses, as well as recovers attorneys' fees and costs incurred in taking such actions. The division facilitates the informal resolution of consumer problems by notifying businesses of written complaints and mediating those complaints. It provides information and education to businesses and to the public on consumer rights and issues, and sends out alerts and press releases when consumers or businesses are targets of fraudulent or predatory activities.
- The division is also responsible for the administration of Washington's Lemon Law for new motor vehicle warranty enforcement. This law helps owners of new vehicles with continuing warranty problems. The services include arbitration to resolve consumer and manufacturer warranty disputes, consumer and industry education and enforcement of manufacturer and dealer obligations.

## ● Legal Services Provided

- **Overall Priorities:** In 2004, the division emphasized efforts to educate, mediate, arbitrate and undertake enforcement actions in eight significant areas: automobiles, credit/financial industry, health/prescription drugs, internet commerce, privacy and identity theft, senior fraud, telecommunications (including wireless), and multi-state and cross-border issues.
- **Education:** The division increased public education and outreach efforts to consumers and businesses in the state. The division seeks to educate the public about its rights and responsibilities as well as remind legitimate businesses of the proper way to do business in Washington. The division works with a variety of public and private partners to increase its visibility so the public sees the office as a resource, and to leverage its results. Staff from the office provided consumer education to schools, senior centers, civic organizations, industry groups and the business community. The office convened public meetings for consumers. Attorneys provided Continuing Legal Education seminars. Staff testified to influence state and national legislation, held press conferences and appeared on radio and television programs.
- **Mediation:** The division provides informal mediation of consumer complaints through six Consumer Resource Centers (CRCs) which are located

## Consumer Protection Division

in Bellingham, Seattle, Tacoma, Vancouver, Kennewick, and Spokane. The CRCs are staffed by consumer services specialists, office assistants and complaint analyst staff. The complaint analysts are comprised of work-study students and volunteers.

The complaint analysts' primary function is to field consumer inquiries and complaints by phone, online and via written correspondence received by mail. The division was one of the first in the country to mediate complaints online through the Attorney General's Office website. In addition to the informal mediation process that has existed for decades, the division is also able to offer consumers and businesses a formal mediation process that is a result of a decade old collaboration between the division and the University of Washington Law School's Clinical Law Program. This collaboration has been used to resolve not only some of the daily consumer complaints, but it has also been used as a dispute resolution mechanism that has at times been built into settlements.

**Arbitration:** The Lemon Law helps new vehicle owners who have continuing problems with warranty repairs of substantial defects in their new cars. The law allows the vehicle owner to request an arbitration hearing of Lemon Law disputes with manufacturers through the office. Arbitration hearings are less complicated than court trials. There are no formal rules of evidence or court procedures. Vehicle owners and manufacturers are each given the opportunity to present their version of the facts and have an arbitrator render a decision.

**Investigation:** Investigators develop cases by interviewing witnesses, gathering documentary evidence and other information, and analyzing and reporting on the evidence and information obtained. Paralegals assist in these efforts by processing and preserving documentary evidence, preparing drafts of pleadings and other legal documents and conduct legal research.

**Enforcement:** The division investigates cases and takes enforcement action when necessary. If a business engages in conduct that involves unfair or deceptive practices, legal action may be taken to seek a court ordered injunction to stop the unfair or deceptive behavior and, if appropriate, recover consumer refunds, assess civil penalties, and recover costs and attorney fees. The legal team works closely with other states and agencies, such as the U.S. Department of Justice and the Federal Trade Commission, as well as with federal and county prosecutors to refer cases, conduct investigations and prosecute individuals who commit crimes, unfair acts, or deceptive practices against consumers.

## Numbers/Trends

The division undertook investigation and enforcement actions resulting in over \$2.6 million in total recoveries, including multi-state cases. Of the total recoveries, more than \$504,000 will be disbursed to Washington consumers as direct restitution. The division was awarded over \$1.4 million as reimbursement for investigation and attorney fees and costs incurred for the calendar year. In addition, \$660,000 was awarded for consumer education this year.

**The division undertook investigation and enforcement actions resulting in over \$2.6 million in total recoveries, including multi-state cases.**

## Consumer Protection Division

**The office provided outreach to more than 12,000 people, sent more than 50,000 information brochures to consumers, and had nearly 2 million visitors to consumer protection web pages.**

- Informal mediation of consumer complaints against businesses by the CRCs without litigation or enforcement action resulted in more than \$5.6 million in additional restitution to Washington consumers.
- The division provided the following services to Washington consumers and businesses:
  - The division's six CRCs fielded more than 150,000 phone calls, greeted nearly 1,700 "walk-ins," and processed nearly 20,000 complaints.
  - The division's online complaint center separately handled contacts, complaints and requests for information through the Attorney General's Office website. Consumers filed more than 8,000 complaints online. The division's online complaint center mediated 2,000 complaints and received almost 4,000 e-mail spam complaints.
  - The Lemon Law program separately handled more than 15,000 telephone inquiries and requests for assistance and more than 24,000 website visits. More than 3,200 arbitration packets were mailed to consumers or downloaded from the Lemon Law website. The program had more than 200 Requests for Arbitration resulting in nearly \$4.75 million in refunds and vehicle replacements to Washington consumers.
  - The office provided outreach to more than 12,000 people, sent more than 50,000 information brochures to consumers, and had nearly 2 million visitors to consumer protection web pages.
  - The division responded to nearly 600 Public Disclosure Requests. The Public Records Act provides people with broad rights of access to public records. The act provides that it shall be "liberally construed" to promote the public policy of providing information regarding the activities of government.

## Significant Cases and Developments and Their Impact

### Multi-State and National Cases and Settlements

- **Medco:** This multi-state case involved settlement with one of the major pharmacy benefit managers in the country. The injunctive provisions require increased transparency in drug pricing and ensure the integrity of the physician patient relationship in making drug choices. Twenty states obtained \$20.2 million in cy pres money (restitution or damages contained in a court order or court settlement where the individuals specifically harmed cannot be found or where it is impractical to try to provide the funds to them); \$6.6 million in costs and fees, and up to \$2.5 million in direct restitution to a certain class of consumers. Washington's share of the cy pres money is \$694,749 which we have disbursed to underserved patients through free and community clinics and rural hospitals. Medco contributed \$430,000 for recovery of attorneys' fees and costs. The division also represented the Washington State Health Care Authority in recovering an additional \$1.6



## Consumer Protection Division

million from Medco. This money represented a negotiated settlement of issues surrounding rebate reimbursements owed to the Health Care Authority arising out of its use of Medco as the pharmacy benefit manager for one health care plan for state employees.

**Neurontin:** The chief allegation of consumer protection wrongdoing in this multi-state case revolved around Warner-Lambert's marketing of this FDA approved drug for unapproved off-label uses, especially bi-polar disorder. The settlement was part of a larger settlement which includes both the state Medicaid Fraud workgroup and the U.S. Department of Justice. The consumer protection case settled with an agreement to file an Assurance of Discontinuance. The settlement prohibits improper marketing of the drug that violates FDA law and includes \$38 million in national remedies and \$10 million in costs and fees. Washington's share is \$278,000. The remaining \$28 million will go to a prescriber and consumer education health care fund.

**Ford Motor Credit:** This multi-state case involved concerns that some consumers paid too much to exercise their purchase option at the conclusion of the lease term. Ford Motor Credit Corporation (FMCC) and affiliated dealers, while admitting no violation of the law, have agreed to only charge the contract amount to consumers who exercise their purchase option at a set price at the end of the lease term. FMCC will administer a claims program where consumers may claim \$100 if they bought their lease vehicle during the claims period and did not get their "payoff" figure directly from FMCC. The state recovered costs and fees in the amount of \$149,000.

**Family First:** Two California-based companies (Family First Advanced Estate Planning, Inc., and Group Legal Services, Inc) that sold legal service plans, including estate planning, agreed to stop doing business in Washington and to refund consumers who either failed to receive legal advice from a licensed attorney or bought products as a result of high-pressure sales. The agreement assures no more living trusts will be sold in Washington by these companies. Consumers had accused the companies of making misrepresentations during sales presentations and engaging in high-pressure sales tactics. The approximate \$80,000 resolution included costs, fees and restitution to consumers.

### Other Significant Cases and Settlements

**Debt Solutions, Inc.:** This case filed in Spokane County involved some 1,000 Washington consumers who bought a questionable debt reduction service. The lawsuit alleged Debt Solutions, Inc. (DSI) violated the law by requiring or indicating a preference for payment by credit card; misrepresenting a \$499 charge to consumers; telling consumers there was a "no-cancellation" policy when the law provides for a three-day right of cancellation; misrepresenting the reason why DSI asked for consumers' confidential financial information; and using high-pressure sales tactics. The resolution makes refunds available to each and every affected Washington consumer and imposed a \$250,000 civil penalty (\$225,000.00 suspended). Costs and fees were recovered.

## Consumer Protection Division

**In October, the High Tech Unit (HTU) filed Washington's first state case under the federal CAN SPAM Act, against this California-based spammer who marketed computers to non-profit organizations across the country.**

- **Reverse Mortgage Cases:** Several defendants are the subject of actions filed in Spokane County for inappropriate sales of reverse mortgages followed by sales of insurance or investment products. Allegations include misrepresentations of the value, income potential and appropriateness of certain products and services and severe conflicts of interest.

- **Senior Estate Legal Services, Neil Adkins, et al.:** The state resolved an additional case involving the sale of estate planning to senior citizens. In this case, filed in King County, settlements and summary judgment have effectively terminated the practices of Senior Estate Legal Services. In related matters, Neil Adkins a principal in Senior Estate Legal Services pled guilty to criminal conduct and will be serving time in federal prison. The division also led an interagency regulatory team in an effective program to end predatory sales of living trusts to seniors by unscrupulous companies and individuals. The effort will continue, expanding its scope to a variety of scams aimed at senior citizens and vulnerable populations.

### **Lemon Law Administration**

- The Lemon Law remains a vital and important resource for consumers in Washington. In 2004, vehicles worth more than \$7.15 million have been the subjects of Requests for Arbitrations. Of the eligible Requests for Arbitration, 86 percent were resolved in the consumer's favor through settlements and arbitration awards. In 2004, the program distributed more than 216,000 Notice of Consumer Rights to motor vehicle dealerships for point-of-sale distribution to consumers.

### **Internet Cases and Settlements**

- **Avtech:** In October, the High Tech Unit (HTU) filed Washington's first state case under the federal CAN SPAM Act, against this California-based spammer who marketed computers to non-profit organizations across the country. The company targeted the Seattle School District in particular with thousands of emails. The lawsuit is currently pending in U.S. District Court.

- **Cyconet:** This lawsuit, which was originally filed in April 2003, was resolved with a Consent Decree filed in April 2004, wherein the defendants agreed to cease selling tobacco products over the Internet in Washington and also agreed to pay \$10,000 in costs and fees.

- **Exactadigital:** This lawsuit was filed in March 2004, against a Redmond-based Internet seller of scales who failed to deliver as promised. The lawsuit continues in litigation.

- **Heckel:** Washington's first case under the state's Commercial Electronic Mail Act continued in 2004, with a decision from the Court of Appeals affirming the trial court's summary judgment against the defendant, and upholding the constitutionality of the statute.

- **Internet Advancement:** The HTU filed a lawsuit against this Redmond-based company which guaranteed top placement on search engines for businesses advertising on the Internet. The lawsuit alleged the defendants

## Consumer Protection Division

failed to deliver the top placement as promised and failed to honor the terms of their guarantee. The case was settled in August 2004, with a stipulated judgment, and provided for restitution for victims of the defendants' practices, as well as extensive injunctive relief, civil penalties of \$50,000 (\$25,000 suspended) and attorney's fees of \$24,432.

**Nature's Advantage:** The HTU filed a lawsuit against this Seattle-based seller of breast enhancement products who advertised on the Internet. The lawsuit alleged the defendant's claims of efficacy and safety were unsubstantiated. The case was settled in August 2004, with a stipulated judgment wherein the defendant agreed to stop doing business. The judgment also required the defendant to pay \$11,048.57 into a cy pres trust for the benefit of the Susan Komen Breast Cancer Foundation, as well as \$7,000 in costs and fees.

**Worldlink:** This lawsuit was filed and resolved with a consent decree in January 2004. The lawsuit alleged that the defendant, an Internet Service Provider in Everett, engaged in deceptive billing practices and made unauthorized charges on customers' accounts. The consent decree provided for extensive injunctive relief, restitution of \$876.10, attorney's fees of \$12,000, and a civil penalty of \$10,000 (\$5,000 suspended).

### Other Significant Work of the High Tech Unit

**Spam:** The HTU continues to be a national leader in bringing spam enforcement actions and shaping national policy in the regulation of spam. Washington is the co-chair of the FTC-State Spam Task Force, and regularly participates in training, advising on regulatory issues, and engaging in public speaking on spam-related issues. We also coordinate with Microsoft and other Internet Service Providers in bringing cases and sharing information.

**Technology Initiatives:** In addition to website upgrades, the division continues to look at various types of technology upgrades in order to work more efficiently but also to enable the HTU to bring better cases. One example is a project in collaboration with the Microsoft Corporation. Microsoft is working with a contractor to develop an application that allows them to collect better evidence in order to further their spam litigation efforts. We are working with Microsoft to provide information about what kind of data needs to be collected in spam cases but also to determine whether such a tool could benefit not only Washington but states throughout the country.

**Outreach and Education:** High tech fraud was a popular outreach topic throughout the year. Many of the Fraud Fighter trainings conducted in partnership with AARP included tips about avoiding fraud on the internet. Identity Theft, Phishing, and Spam were other frequent topics at outreach events and training opportunities provided by all of the members of the High Tech Unit.

### Public Education and Outreach

**Website Redesign and Focus Group Project:** A goal of the division is to provide the best information possible to the consumers of Washington

**High tech fraud was a popular outreach topic throughout the year. Many of the Fraud Fighter trainings conducted in partnership with AARP included tips about avoiding fraud on the internet.**

## Consumer Protection Division

- State. As such, we began planning for upgrades to the AGO website in order to better deliver our services. In April, the division held three focus group sessions made up of web experts and users of the website. They were asked about what they wanted from an AGO website. A white paper was created based on the results of the focus group which was eventually presented to the National Association of Attorneys General at the annual Internet Conference.
- The division updated and added content throughout the website and also introduced a new "corner" of the website aimed specifically at businesses, entitled "Tips and Resources for Businesses." In addition, the division launched a more sophisticated, user friendly search engine to enable easier navigation on the site in November 2004.
- **Brochures:** Our office provides brochures to the public. We publish a variety of brochures, fact sheets and other information resources. Many of our brochures are available in Spanish and Russian. We continue to work with nonprofit partners to produce these brochures in additional languages. Our brochures can be downloaded from our website.
- **Drug Smart:** The Attorney General's Office worked with AARP in a consumer education campaign to help citizens be Drug Smart. The goal of this education effort was to help people save money through the smart and safe use of prescription drugs.
- **Ellensburg High School:** The Teen Consumer Scrapbook is a website created and maintained by teens at Ellensburg High School as part of the Family and Consumer Sciences program. The goal of this educational site is to inform youth about consumer issues of particular interest to them and to encourage problem solving and critical thinking in the marketplace.
- **Fraud Fighters:** The Attorney General's Office, in collaboration with AARP of Washington and the Retired Senior Volunteer Program, launched a public education program targeting seniors called Fraud Fighters. Over 5,000 people have received Fraud Fighter training.
- **Latino Outreach:** The office participates in a variety of Latino outreach and culturally diverse events. Radio KDNA in Granger features a monthly consumer show on a variety of current issues. They also provide consumer alerts to the public. In addition, our office participates in a variety of presentations, conferences, and contacts with the media about issues related to the Hispanic community.
- **LifeSmarts:** Our office sponsored the 2004 LifeSmarts consumer education program aimed at teens to improve their skills and knowledge to make informed decisions in the marketplace. A state competition is held each year where the winning team proceeds to the national competition. In 2004, Ellensburg High School won the state competition and traveled to Chicago, Illinois, where the school placed third in the national competition.
- **Living Trust Team:** The Living Trust Team was created in response to an increase in the number of "living trust mill" businesses preying on senior

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citizens in Washington State. We are working with the Washington State Bar Association, the Department of Financial Institutions, the Office of the Insurance Commissioner and other stakeholders to eliminate these practices through business training, consumer education and strong enforcement. The Consumer Protection Division wrote, produced, shot, edited and acted in a "Living Trust Video" which was featured at a Living Trust, Best Practices Seminar for attorneys in October 2004.

**Medco Health Solutions, Inc. Settlement:** As a result of the Medco settlement, an advisory committee was convened to determine how to distribute Washington's share of the settlement. The settlement money was distributed to 22 community health clinic contractors, 10 free clinics, 15 rural public hospital districts and 2 rural non-district not-for-profit hospitals across Washington.

**Cy Pres Program:** Six nonprofit organizations received funding totaling about \$500,000 for consumer education projects. The grantees are Affiliated Tribes of Northwest Indians, the Foundation for Russian American Economic Cooperation, Northwest Communities Education Center, Northwest Justice Project, United Way of King County Coalition (coalition members include the International District Housing Alliance, the Low-Income Housing Institute, the Seattle-King County Coalition for Responsible Lending, the Urban League or Metropolitan Seattle, and the Washington Chapter of the Association of Community Organizers for Reform Now) and the Washington State Bar Foundation.

**Responsible Corporate Leadership Conference:** In October 2004, the Attorney General's Office held its first Responsible Corporate Leadership Conference in partnership with the Washington State Bar Association and the Center on Corporations, Law & Society at Seattle University School of Law. Industry leaders in the state provided information on law reform and best practices. This program provided information on what consumers expect of high performing companies and what government can do to assist in creating a race to the top.

**Wireless Education:** The Attorney General's Office worked with the wireless industry to improve customer satisfaction. Working with Washington wireless carriers, a brochure entitled "The Ten Things You Should Know Before You Buy Wireless Telephone Service" was developed for consumers and delivered to actual sales locations.

# Public Counsel Section

**The Public Counsel Section represents consumers who would not otherwise have an effective voice regarding the rates, services, and business practices of the investor-owned telephone, electric and natural gas utilities operating in the state.**

## ● **Summary of Responsibility**

- The Public Counsel Section represents consumers who would not otherwise have an effective voice regarding the rates, services, and business practices
- of the investor-owned telephone, electric and natural gas utilities operating in the state. Cases are conducted and issues presented in proceedings
- before Washington's Utilities and Transportation Commission (WUTC), in state court, and in other forums as appropriate.

## ● **Legal Services Provided**

- The Public Counsel Section advocates for the interests of consumers in major rate cases and other cases before the WUTC, by presentations at WUTC bi-weekly business meetings, through technical study groups, in court appeals, and before the Legislature and other policy makers.

- The section maintains contact with the public through a citizen advisory committee, community organizations, personal contact, and letters and telephone calls from consumers in major rate cases. The citizen advisory
- committee is appointed by the Attorney General to provide a sounding board for utility issues of concern to citizens. Its members come from all over the
- state and from various backgrounds and interests. The committee meets five times a year to provide advice and to learn about current utility issues.

## ● **Significant Cases and Their Impact**

### ● **Telecommunications**

- **Verizon Northwest Rate Case:** In 2004, Verizon filed a general rate case seeking to increase residential phone customer rates by 75 percent.
- As part of the case, Verizon also asked for an "interim" or emergency rate increase of \$30 million to be paid by customers while the case was being
- litigated. Public Counsel and other parties contested the interim increase through expert testimony questioning the existence of a financial emergency.
- The WUTC denied the interim rate request and the full case is proceeding to hearing and decision in spring 2005. One issue in the case is whether
- Verizon's profitable "yellow pages" business should be taken into account when determining any company revenue shortfall.

- **US West/Qwest Merger Benefits Enforced:** Public Counsel and other parties negotiated approval conditions for the 2000 Qwest/US West merger which continue to benefit customers.



## Public Counsel Section

- These include a three-year rate freeze in effect through 2003, infrastructure improvements, protection against consumers bearing the costs of the merger, customer specific service guarantees (e.g., bill credits for service failures), and a Service Quality Performance Program under which Qwest must pay up to \$20 million per year in credits to customers if it fails to meet service quality requirements. Public Counsel has been monitoring and helping enforce company compliance with the merger conditions, particularly in the area of service quality. For calendar years 2001-2003, Qwest was required to pay approximately \$7 million in customer credits due to missed service quality targets.
- In 2004, Qwest formally petitioned to terminate the Service Quality Performance Program. Public Counsel and other parties opposed the petition at hearing and the Commission denied the request, although some modifications requested by the company were adopted.
- Public Counsel also successfully advocated for improved public reporting of Customer Service Guarantee program performance so that the WUTC and the public could be aware of the number of violations and the amounts of compensation paid under the program. This information was not previously made available.

### Energy

The past year saw an unprecedented number of rate case filings by energy utilities, in addition to other activity.

**Puget Sound Energy's 2004 General Rate Case:** Public Counsel is currently engaged in a proceeding before the WUTC to determine whether Puget Sound Energy's request for an \$81 million increase in electric rates and a \$47 million increase in gas rates should be granted.

**PSE Power Cost Only Rate Case:** Public Counsel concurred in PSE's request for new rates to pay for newly acquired Fredricksen plant. In the same case, Public Counsel successfully supported disallowance of approximately \$15 million in imprudently incurred gas purchase costs for the Tenaska plant.

**Avista General Rate Case:** Public Counsel is also currently engaged in a proceeding before the WUTC involving Avista's request to increase residential gas rates by approximately 7.1 percent.

**Northwest Natural Gas Rate Case:** Northwest Natural Gas Company sought a 15 percent revenue increase of approximately \$7.9 million. Public Counsel entered into a settlement with NNG and other parties that reduced the increase by about \$4.4 million from the original request. The company agreed to implement a low-income weatherization program in a manner consistent with its program in Oregon, and the company withdrew its decoupling proposal from this proceeding.

## Public Counsel Section

**Public Counsel was also active in the “Pacific Northwest Refund” docket before FERC, supporting efforts by Northwest utilities to obtain relief from unreasonable energy prices they paid in the dysfunctional Western energy markets during the recent crisis period.**

- **Pacificorp Appeal:** In 2003, Public Counsel successfully opposed Pacificorp’s attempt to recover an additional \$16 million in “excess” power costs from consumers during a rate freeze period. The commission denied the company’s request, but in spite of an existing Pacificorp rate case settlement which prohibited rate increases in 2004 and 2005, allowed the company to file a new rate case to show it needed an increase. Public Counsel has filed an appeal of the decision in order to uphold the terms of the original settlement and also contested the new rate case, filed in December 2003.
- **PacifiCorp 2003 Rate Case:** PacifiCorp was allowed to file a rate case during the agreed rate freeze period, seeking a \$26.7 million annual increase (13.5 percent). The company and commission staff reached a settlement, agreeing to a rate increase of approximately \$15 million. Public Counsel had filed expert testimony recommending a reduction and, along with the industrial customer intervenors, opposed the settlement. The commission approved the settlement.
- **Puget Sound Energy - Resource Planning:** Public Counsel has actively participated, using consultants and its own staff, in PSE’s detailed collaborative advisory group processes to develop an integrated resource plan (Least Cost Plan). This led to the filing of the PSE 2003 Least Cost Plan and now involves PSE’s next plan for 2005. Public Counsel also is a participant in the PSE Conservation Advisory Group.
- **Federal Issues:** While the section primarily focuses on state regulatory issues, activities by the Federal Energy Regulatory Commission (FERC) have become increasingly significant for Washington consumers. In particular, the section has opposed efforts by FERC to continue and expand deregulation of the wholesale electricity markets in the face of the recent Western energy crisis as such efforts go beyond federal jurisdiction and threaten important Northwest public interests. Public Counsel was also active in the “Pacific Northwest Refund” docket before FERC, supporting efforts by Northwest utilities to obtain relief from unreasonable energy prices they paid in the dysfunctional Western energy markets during the recent crisis period.

### Major Issues/Events

- **Electric Utilities - Major Rate Pressures:** The years 2000 and 2001 saw some of the most extreme wholesale energy prices on record, driven substantially by the California market debacle and compounded by historic drought conditions in the Northwest. The region suffered severe economic impacts, including plant closures and layoffs. The crisis has created upward pressure on electric rates and increased the importance of energy efficiency programs. Efforts by FERC to continue deregulatory efforts in the wholesale market created serious concerns for consumers in the Pacific Northwest.
- **Telecommunications:** The movement towards a competitive telecommunications industry, especially at the local level, has a long way to go and has created much litigation. Nearly eight years ago, Congress passed the landmark Telecommunications Act of 1996, which requires local companies to open parts of their networks for the use of competitors, with

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payment at a fair price. In the wake of the act, the WUTC has been examining universal service, access charges, and prices for unbundled network elements, and other competition issues. The FCC, in its Triennial Review Order, ordered state commissions to re-examine a range of unbundling and other issues, but that effort was put on hold by federal court action initiated by "Baby Bells" and other incumbents. The introduction of competition under the Telecom Act framework is now in some question. Other major issues include service quality concerns, particularly for large local phone companies and enforcement of conditions attached to approved mergers involving Washington's largest local telephone companies, GTE (now Verizon) and US West (now Qwest).

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# **Preserving Washington's Health and Environment**

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# Agriculture and Health Division



## Summary of Responsibility

The Agriculture and Health Division provides legal advice and litigation services to the Department of Health and its associated boards, commissions and committees; the State Board of Health; the Health Care Authority; the Department of Agriculture; 24 Commodity Commissions; the Department of Community, Trade and Economic Development and its associated boards, commissions and committees; the Northwest Compact on Low Level Radioactive Waste Management; and the Home Care Quality Authority.

## Legal Services Provided

The division provides a full range of legal representation to its clients, including both legal advice and litigation services. The work involves the oversight of health care practitioners and facilities and regulation of activities that may pose threats to human health such as food processing, the conveyance of public drinking water, the application of pesticides and the disposal of radioactive materials. Other major efforts include assisting the Department of Health and Board of Health in their bioterrorism preparedness planning; responding to emerging diseases and other health emergencies; and adoption of isolation and quarantine rules. The division advises the Health Care Authority and Public Employees Benefits Board with respect to state employees' health care benefits and the basic health plan. The division's work with the Department of Community, Trade and Economic Development includes assisting with its outreach to other state agencies and local governments on the Growth Management Act (GMA); assisting in the review of archaeological site permitting; and providing legal advice to their business development, economic assistance, housing services, energy policy, state building code council, community services, WorkFirst, and international trade programs. The division assists the Department of Agriculture in eradicating and controlling serious plant and insect pests, such as Spartina, the Gypsy Moth and Citrus Longhorned Beetle; protecting animal health, overseeing food safety in, and protecting the economic viability of, agricultural commodities, all of which were involved in the recent discovery of bovine spongiform encephalopathy (commonly known as "Mad Cow Disease"); and enforcing the grades and standards laws related to shipping and exporting billions of dollars worth of this state's agricultural products. The division advises and represents its client agencies in their implementation of legislative initiatives to promote community and economic development and improve public health.

**The work involves the oversight of health care practitioners and facilities and regulation of activities that may pose threats to human health such as food processing, the conveyance of public drinking water, the application of pesticides and the disposal of radioactive materials.**

## Agriculture and Health Division

**The Department of Health and the Department of Agriculture are key agencies in assisting the Governor in counter-terrorism (emergency) preparedness for a variety of events, including SARS, West Nile Virus, and animal health emergencies. The division will continue to assist these agencies with legal issues in preparing for, and responding to, agricultural and health emergency events.**

### Numbers/Trends

Most of the division's litigation caseload involves administrative disciplinary actions against health professionals. While the number of cases has remained relatively constant, the hearings have become increasingly complex. The Department of Health and the Health Care Authority continue to work on initiatives to address access to health care and rising health care costs, particularly for prescription drugs.

The Department of Agriculture is responsible for controlling plant and insect pests that threaten the state's agricultural commodities. With the increase in the proliferation of such pests, we are encountering increasing tension, involving the need for inspection, control and eradication, and private property interests or environmental concerns.

The Department of Health and the Department of Agriculture are key agencies in assisting the Governor in counter-terrorism (emergency) preparedness for a variety of events, including SARS, West Nile Virus, and animal health emergencies. The division will continue to assist these agencies with legal issues in preparing for, and responding to, agricultural and health emergency events.

In this last year, the division's work for the Department of Community, Trade and Economic Development (CTED) included an increase in litigation activity in growth management; increased work in advising on international trade, including the Governor's Advisor for Trade Policy; review of economic development proposals and contracts; and a greater involvement with the Office of Archeology and Historic Preservation to assist in the preservation of tribal remains and artifacts.

### Significant Cases and Their Impact

**In the Matter of Property Located at 14255 53rd Ave. S., Tukwila, King County, Washington (formerly, Malbrain and Terrell v. State):** In August 2001, the Washington Department of Agriculture (WSDA) learned that several Citrus Longhorned Beetles (CLHB) escaped quarantine in a shipment of bonsai trees at a nursery in south King County. CLHB is an invasive pest which destroys many types of trees. Upon the advice of a scientific panel, the department sought permission from neighboring property owners to remove the types of trees on their property which would serve as hosts for the proliferation of the CLHB. The Governor issued an emergency declaration, authorizing the removal of host trees. Most of the affected property owners consented to the tree removal. The plaintiffs, three property owners who did not consent, wanted to be compensated in advance of the tree removal, arguing that the removal of the trees constituted a "takings" under the Washington and U.S. Constitutions. In March 2004, the Court of Appeals issued its decision, holding that the removal of the trees to contain or abate a public calamity is not a compensable taking under either the U.S. or Washington Constitutions. Plaintiffs have filed a motion for discretionary review with the state Supreme Court, which WSDA opposed. A decision on the motion is still pending.



## Agriculture and Health Division

**Ongom v. Department of Health:** The Department of Health took action against the registration of a nursing assistant based upon findings that she abused a patient. The findings were supported by a preponderance of the evidence, but not by a clear and convincing standard of proof. In *Nguyen v. Medical Quality Assurance Commission*, the Washington Supreme Court held that the state must meet the clear and convincing standard of proof to take action against a physician's license. Subsequent to that decision, the courts of appeal have issued decisions holding that the preponderance of the evidence standard is sufficient for taking action against a real estate appraiser's license *Eidson v. Department of Licensing*, and requiring the clear and convincing standard of proof in action against an engineer's license *Nims v. Board of Registration for Engineers and Land Surveyors*. Alice Ongom appealed to the King County Superior Court, which affirmed the department's application of the preponderance of the evidence standard to take action against her license. She appealed to the Court of Appeals, which heard arguments in November 2004, and is now awaiting the courts decision.

**Snohomish County GMA Cases:** At the direction of the Governor, CTED filed appeals of amendments to Snohomish County's county-wide planning policies, comprehensive plan, and development regulations. The appeals focused primarily on provisions that expanded the Arlington Urban Growth Area (UGA) to include an area known as Island Crossing. CTED and others contended the county did not demonstrate that this UGA expansion was necessary to accommodate projected population growth, and that it improperly expanded the UGA into a frequently flooded area that also is designated as agricultural land of long-term commercial significance. A second focus of the appeals was on provisions impermissibly allowing rural churches and schools to connect to sewers. The Central Puget Sound Growth Management Hearings Board issued four decisions on the appeals. In response to one of the decisions, the county rescinded the challenged amendments (the allowance of rural churches and schools outside the UGA to connect to sewers). The county appealed the other three decisions. The Thurston County Superior Court reversed one of the decisions, holding that the Governor and CTED's authority in statute to appeal county actions under the GMA is limited to the comprehensive plans and development regulations and does not extend to county-wide planning policies. The county's appeals of the two remaining board decisions are scheduled for hearing in April 2005.

## Major Issues/Events

**Counter-Terrorism and Emergency Preparedness:** Since the fall of 2001, the division has assisted the Department of Health in the preparation of several counter-terrorism and emergency preparedness and response plans. These include the bioterrorism plan, smallpox pre-event and post-event plans, and the SARS plan. Assistance and advice are also being provided on a number of legal issues arising in this area, including the preparation of templates to implement quarantine and isolation, consistent with state law and procedures.

**West Nile Virus:** Washington is the only state in the continental U.S. without a human case of West Nile Virus. The Department of Health expects

## Agriculture and Health Division

**The Rx Washington card program is a discount purchasing arrangement whereby low income, uninsured residents purchase drugs at 15 to 20 percent less than retail prices through a government contracted mail service pharmacy.**

- Washington to experience human cases and has been preparing for that event. The division assisted DOH in preparing its West Nile Virus response plan, working with county governments.
- **Flu Vaccine Shortage:** When the U.S. experienced a loss of half of its vaccine supply due to contamination at one of the manufacturer's laboratories, the public health system identified the populations most in need of the vaccine based on the dangers of contracting influenza. Some of the local health jurisdictions issued orders directing health care providers to only vaccinate individuals within the identified at-risk categories. Health care providers have, to a great extent, voluntarily complied with the recommendations. Several legal issues have arisen around the vaccine shortage, particularly with respect to the Department of Health's role and authority.
- **Access to Prescription Drugs:** In 2003, the Legislature passed SB 6088, creating a Prescription Drug Program expanding efforts to make prescription drugs more affordable for consumers. The Health Care Authority staffs an independent Pharmacy and Therapeutics Committee (P&T Committee), which is charged with developing a preferred drug list based on best scientific evidence for use by government programs purchasing health care for its clients. In addition, the P&T Committee developed the Pharmacy Connections program to match manufacturer-sponsored drug assistance programs with some categories of Washington residents. The Rx Washington card program is a discount purchasing arrangement whereby low income, uninsured residents purchase drugs at 15 to 20 percent less than retail prices through a government contracted mail service pharmacy. Recently, the Governor authorized a link to the Wisconsin and Minnesota web-based programs which allow residents to purchase drugs for personal use from Canadian pharmacies, which were inspected by Wisconsin or Minnesota.
- **Implementation of Federal CAFO Rules and Livestock Nutrient Management Program:** Soon after new federal regulations were enacted relating to Concentrated Animal Feeding Operations ("CAFOs") under the federal Clean Water Act, the 2003 Washington State Legislature transferred the responsibility for inspecting livestock facilities and enforcing water quality laws for these operations to the Department of Agriculture. The new law requires livestock facilities to properly manage their manure so water quality is not adversely affected. Litigation is anticipated, including defense of civil penalties before the Pollution Control Hearings Board, and injunctive and other civil actions for serious water quality violations attributable to livestock nutrients.

# Ecology Division



## Summary of Responsibility

The Ecology Division represents the Department of Ecology, Puget Sound Action Team, Pollution Liability Insurance Agency, and the State Conservation Commission.

## Legal Services Provided

The Ecology Division, which is located in Olympia, consists of 23 attorneys, 2 paralegals and 15 professional staff. The division works to resolve environmental problems and disputes using a variety of legal tools including negotiation, multi-party mediation, and litigation when necessary. Division attorneys provide advice on a broad spectrum of matters, including permitting, legislation, rule-making, and enforcement. The division's practice includes hearings before administrative boards as well as trials and appeals before state and federal courts.

## Numbers/Trends

The largest area of the division's workload is in the area of water allocation and management. In recent years, the Department of Ecology has dramatically increased its investment in the processing of water rights applications with an attendant increase in litigation involving water rights decisions. In addition, division work to assist Ecology in oversight of the U.S. Department of Energy's (DOE's) cleanup of the radioactive waste at Hanford has also intensified as the result of DOE's recent efforts to accelerate cleanup decisions and to send off-site waste to Hanford for storage or disposal. Other areas of significant workload include supporting the Department of Ecology with the cleanup of contaminated sites, stormwater regulation, regulation of hydroelectric dams, development of instream flow regulations, implementation of new shoreline management guidelines, and the permitting of major economic development projects such as the Sea-Tac Airport Third Runway Project.

**Water Resources:** Cases in this area include defending permit decisions, rules, and enforcement actions as well as prosecuting general stream adjudications. The division assisted the Governor's Office and the Department of Ecology in the development and implementation of a judicial and legislative strategy to reform the state's system of water resource management. The division worked in conjunction with Ecology to complete a report on Streamlining Adjudications. Further, the division assisted the Attorney General in leading a Water Disputes Task Force in its study of judicial and administrative alternatives for resolving water rights disputes. In the area of litigation, which drives the majority of the division's workload

**The division assisted the Governor's Office and the Department of Ecology in the development and implementation of a judicial and legislative strategy to reform the state's system of water resource management.**

## Ecology Division

**For the spill prevention program, division attorneys represent Ecology in numerous enforcement actions against companies responsible for oil spills and are assisting in development of rules governing the contingency plans for oil handling facilities in Washington.**

- in the water resources area, division attorneys are currently litigating issues of enforcement, instream flow regulation, tribal water rights, municipal water rights, the licensing of groundwater withdrawals, and a significant number of cases involving the change or transfer of existing water rights.
- In the state's longest running general adjudication, Acquavella, the division will continue with efforts to use mediation to significantly narrow the issues remaining to be litigated.
- **Water Quality and Spill Prevention Program:** The division's water quality practice involves a significant amount of work providing advice on permit actions, and defending challenges to Ecology's permit decisions. There are significant numbers of enforcement actions such as orders and penalties that are subject to administrative hearings and judicial review. The division is also advising the Department of Ecology regarding its efforts to address non-point source pollution and its implementation of the Total Maximum Daily Load requirements of the federal Clean Water Act. A significant component of work in this area is associated with advising and defending the department's decisions regarding the regulation of stormwater discharges and the adoption of new statewide water quality standards. For the spill prevention program, division attorneys represent Ecology in numerous enforcement actions against companies responsible for oil spills and are assisting in development of rules governing the contingency plans for oil handling facilities in Washington.
- **Hazardous Waste Management and Cleanup:** In this area of the division's practice, assistant attorneys general negotiate and enforce consent decrees and orders requiring cleanup of sites contaminated with hazardous substances. The division also defends Department of Ecology permit decisions and enforcement actions against facilities that generate, treat or dispose of hazardous wastes in order to prevent the creation of more contaminated sites. The division continues to look for opportunities to promote "brownfields development" through the use of innovative agreements that allow purchasers of contaminated property to resolve liability concerns, thus freeing up the properties for development. Significant areas of work include advising and defending Ecology as it develops new regulatory approaches for handling emerging problems such as the closure of major hazardous waste treatment, storage and disposal facilities, and the widespread contamination of arsenic and lead resulting from lead smelters and the past application of lead arsenate to fruit orchards. In addition, the division is also assisting the department in its efforts to ensure cleanup at federal facilities. Finally, division work in the bankruptcy courts has increased as businesses with environmental cleanup obligations seek bankruptcy protection.
- **Shorelines:** Division attorneys are involved with resolving Shoreline Management Act disputes at all levels of administrative and judicial review. The primary cases handled in the Ecology Division in this subject matter area are Shoreline Hearings Board appeals of department actions regarding local government shoreline permit decisions. As a consequence of new shoreline management guidelines, a significant component of future work will focus on rule proposal and adoption and then development, review, and appeals focused on the updating of shoreline master programs across the state.
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## Ecology Division

**Air Quality:** In this area, the division defends Department of Ecology permit decisions and enforcement actions. The department is currently implementing a program requiring issuance of complex, facility-wide air operating permits that continue to generate additional workload for the Ecology Division both in requests for advice as well as defenses of permit decisions. The department continues to actively enforce its regulations relating to agricultural burning through the issuance of enforcement orders, which are often appealed. In addition to defending against these appeals, the division is currently defending the department's grass-burning regulation against a challenge associated with one of the enforcement cases. Finally, the division is currently representing Washington in multi-state climate change-related litigation challenging EPA's decision that carbon dioxide is not a pollutant under the Clean Air Act.

**Environmental Bankruptcy:** Washington played a leadership role in several major bankruptcy proceedings in which the debtors attempted to abandon contaminated property or transfer the property free and clear of significant environmental liabilities. Our aim in each of these proceedings was to avoid creating "orphan" sites, and to ensure that satisfaction of environmental liabilities is a condition of any protection granted by the bankruptcy courts.

**Other:** Division attorneys also work in a number of other areas including the regulation of water well drillers, solid waste management, environmental review of significant projects under the State Environmental Policy Act, and oil spill prevention and cleanup. The area of hydroelectric dam regulation has been an increasing focus of the division and the work has extended beyond Washington cases to coordinating national efforts to protect state authority in this area. Similarly, the office has been a leader in a national effort by state attorneys general resisting efforts by the federal government to reduce state authority over the environmental impacts of military bases.

## Significant Cases and Issues

**SeaTac Third Runway:** In this case argued by the Ecology Division, the State Supreme Court issued a decision on the appeal of the Clean Water Act Section 401 water quality certification issued to the Port of Seattle for the proposed third runway at SeaTac Airport. The court upheld Ecology's certification and clarified the standard of review to be used by the Pollution Control Hearings Board. This decision led to the withdrawal by opponents of the runway from other related legal challenges and allowed the Port of Seattle to move forward with construction.

**Ecology v. Tiger Oil Corp., et al.:** This case, involving a challenge to the constitutionality of the Model Toxics Control Act, was settled in late 2004. The case arose in the context of Ecology's efforts to ensure cleanup of property contaminated with petroleum products through an enforcement action. In the settlement, the responsible party agreed to provide financial assurance and to clean up its contaminated property. The settlement followed Ecology's victory in a series of partial summary judgment motions on the constitutional claims and on Tiger Oil's liability.



## Ecology Division

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- **Water Disputes Task Force:** The Attorney General chaired a Task Force of legislators, judges and agency representatives with responsibility for analyzing and reporting on options for improving the state's water rights disputes processes. Ecology Division attorneys provided staff support and developed a report to the legislature describing the task force's recommendations. The division formally presented the task force report to the Legislature at informational hearings.
- **Lummi:** In this ongoing lawsuit, the U.S. District Court ruled against the state on two significant legal issues raised in summary judgment motions. First, the court ruled as a matter of law that there is a federal reserved right to groundwater which extends to the case area within the Lummi Reservation. Second, the court ruled that there were genuine issues of material fact concerning whether agriculture was a primary purpose of the reservation, so the court did not rule on summary judgment whether the reserved right should be quantified by the practicably irrigable acreage standard. The trial date has been set and struck several times and we are currently waiting for the court's new trial schedule most likely to occur in the first half of 2005.
- **Global Warming Suit by States:** Washington joined a number of other states in challenging a decision by the U.S. Environmental Protection Agency (EPA) that carbon dioxide is not a "pollutant" under the Clean Air Act. Resolution of this issue is a prerequisite to another pending lawsuit requiring EPA to update its New Source Performance Standard for power plants to include regulation of carbon dioxide emissions. Dispositive motions have been filed and argument before the D.C. Circuit Court of Appeals is set for April 2005.
- **Hanford:** Litigation continues over the U.S. Department of Energy's (DOE) decision to ship out-of-state radioactive waste for storage or disposal at Hanford. In addition to obtaining an injunction against shipments of a form of radioactive waste known as transuranic waste, the state has also sued under the National Environmental Policy Act to stop shipments of low-level radioactive waste.
- Also related to Hanford, the division remains involved in DOE's appeal to the Ninth Circuit of a U.S. District Court decision holding that DOE exceeded its authority under the Nuclear Waste Policy Act. Washington filed an amicus brief, joined by five other states, challenging an internal DOE regulation authorizing the reclassification of high-level radioactive waste.
- **Lake Roosevelt Litigation:** Washington moved to intervene in a citizens suit filed by members of the Colville Confederated Tribes against Teck Cominco Metals, a Canadian corporation, under the federal Comprehensive Environmental Response, Compensation and Liability Act. For decades, Teck Cominco discharged tons of hazardous slag from its mining operations into the Columbia River, which flowed downstream, crossed the border, and contaminated Lake Roosevelt. The suit seeks to compel Teck Cominco to comply with an EPA enforcement order that required Teck Cominco to investigate the contamination.
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# Fish, Wildlife, and Parks Division



## Summary of Responsibility

The Fish, Wildlife, and Parks Division represents the Washington Department of Fish and Wildlife (WDFW) and the State Parks and Recreation Commission in legal matters before state and federal courts and administrative tribunals. In addition, the division advises the client agencies in civil and criminal matters, assists local prosecutors, and provides general information to the public concerning natural resources issues.

## Legal Services Provided

The division provides litigation and advice services regarding fish and wildlife resource management, habitat protection, tribal issues, rule adoption, public disclosure, hydropower licenses, law enforcement, land acquisition and management, public works construction, endangered species issues, water rights, and contracts. Litigation may involve State Environmental Policy Act, Shoreline Management Act and Growth Management Act cases, appeals of licensing actions, hydraulic project approvals and forest practice permits.

**Litigation may involve State Environmental Policy Act, Shoreline Management Act and Growth Management Act cases, appeals of licensing actions, hydraulic project approvals and forest practice permits.**

## Numbers/Trends

The Endangered Species Act (ESA) has been the source of a growing workload for client agencies and the division. The division counsels and represents WDFW in settings related to the protection and recovery of terrestrial and aquatic species that have been listed or are candidates for listing under the ESA. Additionally, citizen initiatives on wildlife management and challenges to them have become increasingly frequent. Tribal issues remain prevalent. Real estate issues and cooperative agreements with non-profits are expected to increase for State Parks.

## Significant Cases/Issues

**United States v. Washington, Subproceeding 89-3 (shellfish):** This subproceeding established that tribes may take up to half of the shellfish from most inter-tidal beaches (from both shellfish farms and private lands) and half of all deep water shellfish fisheries (crab, shrimp, and geoduck). An Implementation Plan was ordered by the court setting forth equitable sharing principles, establishing an obligation to enter into management plans, and setting up dispute resolution procedures. The division continues to assist WDFW in developing and negotiating annual management and harvest agreements. Tribal harvesting from inter-tidal shellfish farming operations remains a challenge. Tribes are only allowed to harvest from lands with significant "natural" populations of shellfish. A dispute resolution proceeding is currently underway to ascertain the threshold density of

## Fish, Wildlife, and Parks Division

**The division worked with WDFW to resolve a dispute that arose last year over allocation of wild steelhead. The division initially assisted WDFW in negotiating a fishing schedule for this year and subsequently assisted in negotiating a multi-year agreement.**

- shellfish needed to establish the existence of a "natural" bed of inter-tidal shellfish. The division assisted the state in refining a settlement proposal under which the Tribes would forgo harvesting on commercial growing lands in exchange for the payment of money. The parties are seeking legislative funding of this agreement.
- **United States v. Washington, Subproceeding 01-1 (culverts):** In January 2001, 21 indian tribes and the federal government sued the state, alleging that the state violates the tribes' treaty "right of taking fish" by owning culverts that block fish passage, to the extent that such culverts impair the tribes' ability to earn a "moderate living" from fishing. The state's position is that its ongoing efforts to identify and repair defective culverts satisfy any treaty-imposed obligation to provide fish passage. The case has broad implications for land use and resources management in the Pacific Northwest. Two years of negotiations failed to produce a settlement. The division is leading a multi-divisional effort to prepare the case for trial which is scheduled for July 2006.
- **United States v. Washington, Subproceeding 03-01 (Hoh wild steelhead):** The division worked with WDFW to resolve a dispute that arose last year over allocation of wild steelhead. The division initially assisted WDFW in negotiating a fishing schedule for this year and subsequently assisted in negotiating a multi-year agreement.
- **United States v. Oregon:** Five Columbia River basin Treaty Tribes, three Columbia River basin states, and the federal government are negotiating a new fish management plan governing fisheries, as well as fish production measures, in the main stem of the Columbia River. The plan adopted in 1988 expired, but the parties have successfully negotiated interim agreements. The division is advising WDFW regarding the complex and challenging legal issues that arise during the negotiations, including those involving the Endangered Species Act (ESA) and its relation to federal Indian law. The agreement, once negotiated, will directly affect multi-million dollar fisheries on the Columbia River.
- **National Wildlife Federation v. National Marine Fisheries Service:** The division continues to represent WDFW and the Governor's Office in this case involving the National Wildlife Federation's challenge to the Columbia River 2000 Federal Columbia River Power System Biological Opinion (BiOp) prepared by the National Oceanic and Atmospheric Administration (NOAA Fisheries) (formerly National Marine Fisheries Service) pursuant to the ESA. In late 2003, the U.S. District Court returned the case to NOAA Fisheries. A new BiOp is expected to be released in late 2004 and is likely to result in additional litigation.
- **Hydropower Issues:** The division represents WDFW and the State Parks and Recreation Commission in proceedings before the Federal Energy Regulatory Commission (FERC) and federal courts, concerning the licensing of hydropower dams in the state. These are lengthy and complex proceedings, involving balancing the economics of electrical power generation and protection of fish and other wildlife resources impacted by the presence and operation of the facilities. Division workload has significantly increased in the last several years as many of the large hydro projects in

## Fish, Wildlife, and Parks Division

Washington are reaching the end of their first 50-year license and are in the process of applying for new licenses. The following major proceedings are representative of the work done by the division:

- **Condit:** This hydroelectric project is located on the White Salmon River. The parties to the relicensing proceeding, including the dam owner, federal and state agencies, the Yakama Indian Nation, and a coalition of environmental groups, joined in a settlement agreement that provided for removal of the dam. After the agreement was submitted to FERC, further environmental review was initiated. The licensee has now begun permitting and approval processes for removal of Condit Dam.
- **Lewis Complex and Baker Project:** The division is assisting WDFW in negotiating comprehensive settlements addressing the impacts to natural resources resulting from operation of four hydroelectric projects on the Lewis River and one two-dam project on the Baker River. These agreements provide for the protection of fish habitat, including safe passage at the projects; restoration of lost wildlife habitat; and mitigation of other unavoidable impacts. Both project negotiations involve the many natural resource parties (state agencies, federal agencies, and tribes), interested nongovernmental organizations, and many other interests (flood control, cultural and historic, and recreation). Each of the settlements will be offered to FERC as the preferred option for the next long term license for the projects.
- **Mid-Columbia PUD Projects:** The division is assisting WDFW with licensing proceedings regarding the public utility owned projects on the Columbia River. After years of negotiation with WDFW and the other fisheries resource parties, the licenses for Chelan PUD's Rocky Reach and Rock Island projects, and Douglas PUD's Wells Project were amended to incorporate the first Habitat Conservation Plan for ESA-listed salmon and steelhead. In addition, the Rocky Reach Project, Chelan PUD's nearby Lake Chelan Project, and Grant PUD's Priest Rapids Project are each in lengthy, complex relicensing proceedings. WDFW, represented by the division, is leading attempts to achieve settlements for the protection of, and mitigation of impacts to, natural resources at these hydroelectric projects.

**Habitat Issues:** The division continues to assist WDFW in its efforts to address habitat protection issues on agricultural lands. These efforts include advising WDFW on its efforts to cooperatively resolve disputes involving jurisdiction under the Hydraulic Code and assisting WDFW and local prosecutors in efforts to ensure compliance with the code.

**Puget Sound Salmon Management:** Washington Trout threatened to file a lawsuit under the ESA to restrict salmon harvest in Puget Sound. The division assisted WDFW in working with area tribes and the NOAA Fisheries to facilitate ESA and National Environmental Policy Act compliance for the 2004 fishing season while working on a multi-year plan to cover future salmon fishing in Puget Sound.

- **Initiatives 655 and 713:** Statewide hunting of cougar, bobcat, black bear, and lynx with hounds and bait was virtually eliminated by Initiative 655 (I-655) in 1996. Initiative 713 (I-713), enacted in 2000, banned the use of body-gripping traps and two types of poison for killing animals. These initiatives are the subject of two pending appeals. In the first appeal, the challenges allege that both I-655 and I-713 violate the Public Trust Doctrine by stripping the WDFW of its management tools, thereby causing the agency to lose control of the state's wildlife. This case is pending in the Court of Appeals. The second appeal is from a Jefferson County District Court decision finding I-655 unconstitutional because it deals with two subjects. An identical challenge was rejected by Thurston County Superior Court several years ago but no appeal was taken. The division's request for direct review of the Jefferson County District Court decision is pending before the state Supreme Court.

- **Buchanan v. Locke, et al.:** The Buchanans brought a claim in U.S. District Court against the Washington State Parks & Recreation Commissioners and Director for allegedly violating their First Amendment rights after a nonprofit corporation that built a community playground at a state park denied their request to inscribe a donated brick with a religious message. After the nonprofit corporation voluntarily decided to allow the brick inscription, the claims against the state defendants were dismissed, based on mootness and failure to state a claim.

- **Statewide Trail System:** The division continues to assist State Parks in its efforts to develop a statewide linear trail system. These include cooperative efforts with the state, federal, and local governments and nonprofit organizations to develop the Klickitat Trail, manage the Mountains to Sound Greenway 100-Mile Corridor, and resolve permit issues on the proposed Rocky Reach Trail.

- **Parks Law Enforcement:** The division is working with State Parks to address questions regarding Parks' officers' authority to enforce laws of the state outside the boundary of state parks. The division's work includes providing advice and assistance in developing possible legislation to clarify law enforcement authority.

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# Natural Resources Division



## Summary of Responsibility

The Natural Resources Division represents the Commissioner of Public Lands, Department of Natural Resources (DNR), Board of Natural Resources, Forest Practices Board, Board of Geographic Names, and other related committees.

## Legal Services Provided

The division provides a broad spectrum of client advice, dispute resolution, and litigation services. DNR manages three million acres of state uplands, generating as much as \$300 million a year for trust beneficiaries, and also manages more than two million acres of aquatic lands. DNR also exercises extensive regulatory, environmental, and fire protection responsibilities on 11.8 million acres of state and private forest lands, and administers several programs designed to purchase property interests to protect riparian areas.

## Numbers/Trends

In 2004, the division received 56 new cases and handled 164 active cases. The division resolved 50 cases. While the overall number of cases has remained fairly constant, the complexity and significance of the cases continues to increase.

During that same time period, the division received 178 new formal requests for advice and worked on 429 requests that were active during the year. The division also reviewed approximately 168 business documents.

The division's workload has increased in several areas:

- Proprietary Forest Management Issues:** DNR has made or is in the process of making a number of decisions about management of forest lands owned by the state and held in trust. Interest groups have become increasingly aware of and involved in DNR's forest land management activities. Given the current state budget crisis, the trust beneficiaries who receive revenue from state timber sales, such as universities, school districts, and counties, are also quite interested in DNR's forest land management decisions. The consequence has been an increased demand for client advice in this area as well as more litigation. The division is currently defending a programmatic challenge to the timber sales program in the Court of Appeals. The division is also defending DNR's establishment of a sustained yield calculation. The sustained yield calculation sets the harvest level of

## Natural Resources Division

**The division has worked closely with key program personnel to establish a framework for the investigation of forest land fires and the processing of meritorious fire suppression claims. A division attorney and paralegal have already collected almost \$900,000 in claims and are pursuing one large fire suppression claim, in excess of \$1 million.**

timber from trust lands for the next 10 years. This number has been challenged by environmental groups. DNR is also currently poised to adopt a legislatively-mandated land management plan for the Lake Whatcom watershed.

- **Proprietary Transactions:** DNR's transactions include monthly timber sales as well as purchases, sales, exchanges, and leases of forest lands, commercial properties, agricultural lands, aquatic lands, and geoducks on aquatic lands. These transactions often raise issues involving the Forest Practices Act, State Environmental Policy Act (SEPA), Growth Management Act, hazardous waste laws, water rights, and the Endangered Species Act. DNR is attempting to expand its agricultural land holdings. Accordingly, the division is assisting with an increased number of complex water rights issues as well as SEPA issues. The division continues to assist DNR in negotiating leases of state land for wind power.
- **Trespass & Ownership Issues:** The division is seeing an increase in the number of trespass cases DNR is asking the division to file. The situations range from expired leases where tenants refuse to re-sign a lease or to pay rent, to cases where property boundaries or ownership are in dispute. DNR is focusing its efforts on determining which rivers and streams throughout Washington State are navigable and thus owned by the state. Division attorneys are assisting in this endeavor.
- **Fire Cost Recovery:** DNR has a statutory right to collect its fire suppression costs when a third party's negligence is responsible for the starting or existence of a fire which spreads on certain forest land and under other enumerated circumstances. DNR decided to refocus its attention on fire cost recovery by placing a higher priority on the division's involvement and resurrecting an aggressive program of cost recovery. As a result, the division has worked closely with key program personnel to establish a framework for the investigation of forest land fires and the processing of meritorious fire suppression claims. A division attorney and paralegal have already collected almost \$900,000 in claims and are pursuing one large fire suppression claim, in excess of \$1 million, with more claims expected to follow as the program continues to mature.
- **Recreation and Access to State Land:** As private landowners continue to close their lands to the public, DNR faces increasing pressure to keep state lands available to the public for recreation. Indian tribes also desire access to state lands for purposes of hunting and gathering of cultural resources. Division attorneys have responded to a number of requests for advice and increasing litigation surrounding issues related to access. Issues include: the ability to regulate the shooting of firearms, the regulation of off-road vehicle usage, access for recreational gold prospecting, DNR enforcement authority generally, and issues concerning the recreational immunity statute. The division also assisted DNR in developing a legislative proposal to create a "legacy trust" to fund public access.



## Natural Resources Division

### Significant Cases and Their Impact

**Washington Environmental Counsel, National Audubon Society, Northwest Ecosystem Alliance, and Olympic Forest Coalition v. Sutherland, BNR, and DNR:** The Board of Natural Resources recently adopted a "sustainable harvest level"--the amount of timber to be harvested from 1.4 million acres of state forest land over the next decade. Environmental groups have filed suit, challenging the harvest level as well as amendments to procedures relating to Northern Spotted Owl protection. They challenge the adequacy of the analysis in the SEPA Environmental Impact Statement (EIS) concerning impacts on the Owl and on ESA-listed salmon, as well as the failure to consider an alternative proposed by the plaintiffs relating to forest certification. Trial is scheduled for May 2005.

**Pacific Sound Resources and Port of Seattle v. Burlington Northern Santa Fe Railway Corp., et al.:** Pacific Sound Resources and the Port of Seattle joined DNR and the state as defendants in a contribution action under the Model Toxics Control Act (MTCA). Plaintiffs seek to recover their costs of cleaning up a Superfund site in King County (allegedly between \$20 and \$40 million) and a declaration that defendants are liable for future costs. The state owns some of the land within the site, and DNR has leased that land. This case involves issues of first impression concerning DNR and the state's liability under MTCA. DNR entered into a settlement agreement with the Port and PSR that resolved the state's landowner liability for this site and the adjacent aquatic lands. One of the conditions for this settlement is that the federal government must provide the state a covenant not to sue and contribution protection under the Comprehensive Environmental Response, Compensation, and Liability Act. DNR and EPA have negotiated an administrative settlement and we are waiting for the public comment period to run before the settlement can become final.

**Alpine Lakes Protection Society v. Forest Practices Board:** Ten environmental groups filed a petition for rule making with the Forest Practices Board. They alleged that the state-wide rules governing timber harvesting and other forest practices failed to adequately address the cumulative environmental impacts of forest practices, and requested the board to adopt new rules. The Forest Practices Board denied the petition. In April 2003, the environmental groups filed a lawsuit in Thurston County Superior Court seeking judicial review of the board's denial. The case involves a significant number of rules and is set for hearing in January 2005.

**Washington Geoduck Harvest Association v. DNR:** This case involves a challenge to the constitutionality of the statute that directs the Department of Natural Resources to sell geoducks. The association alleges the statute violates the public trust doctrine and equal protection guarantees in the Washington Constitution. The association contends that geoducks must be available to all citizens at no charge. In recent years the state has received \$6 to \$10 million a year from the sale of geoducks. In September 2003, the Thurston County Superior Court upheld the constitutionality of the statute. The association filed an appeal. The Court of Appeals, Division II, heard oral argument in October 2004.

# Natural Resources Division

- **State Owned Forests and Washington Environmental Council v. Sutherland:** Several environmental groups filed a programmatic challenge to DNR’s timber sales program. Plaintiffs allege that DNR is failing to adequately address the cumulative impacts of timber harvesting on state land under SEPA. They also challenge on similar grounds DNR’s extension for three years of an existing forest resource plan that contains policies for the management of state forest land. A large number of school districts and counties intervened as defendants. Division attorneys were successful in getting one of the two claims in this case dismissed by the King County Superior Court. The issue of whether the challenge to the forest resource plan was timely filed and served is now pending before the Court of Appeals.

## Major Issues/Events

- **Federal Assurances:** As part of the forest and fish process, the state is seeking from National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service an ESA section 10 incidental take statement and/or coverage under NMFS’ 4(d) rule for activities conducted under the forest and fish rules adopted by the state Forest Practices Board. The state is also seeking assurances from EPA concerning the ability of the state rules to meet certain federal Clean Water Act requirements. Division attorneys have provided and will continue to provide significant legal advice to DNR, Ecology, Fish and Wildlife, and the Governor’s Office during this process. The current schedule has the draft ESA documents and Draft EIS going out for public review this fall, with anticipated incidental take permit issuance by the end of June 2005.
- **Threatened ESA Lawsuit:** The Seattle and Kittitas Audubon Societies sent 60-day notice letters to DNR, the Forest Practices Board, the Director of the Department of Fish and Wildlife, and the Fish & Wildlife Commission, alleging ESA violations because the agencies were allowing harvest of suitable spotted owl habitat. To date, no lawsuit has been filed.

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# **Protecting Public Funds**

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# Revenue, Bankruptcy and Collections Division

**The unit is currently handling approximately 160 cases addressing a wide variety of predominantly excise tax refund claims. Many of these claims are of industry-wide significance.**

## ● Revenue Unit

## ● Summary of Responsibility

- The Revenue Unit of the Revenue, Bankruptcy and Collections Division provides legal services to the Department of Revenue (DOR), which administers and collects the state's major excise taxes. The unit also
- provides legal services related to DOR's administration of the state's property tax system, its assessment of operating property owned by public utilities,
- and DOR's administration of the state's unclaimed property law and the estate tax.

## ● Legal Services Provided

- The unit's principal legal activity involves defending DOR against excise tax refund claims filed in the state courts and the Board of Tax Appeals. The
- unit also handles property and miscellaneous tax litigation and advises DOR on tax and general governmental matters.

## ● Numbers/Trends

- The unit historically receives 40 to 70 new cases annually. In 2004, the unit received 30 cases. The unit is currently handling approximately 160 cases
- addressing a wide variety of predominantly excise tax refund claims. Many of these claims are of industry-wide significance. Additionally, there are
- approximately 45 cases related to out-of-state manufacturer issues. The unit also handled four appellate cases that were decided in 2004.

## ● Significant Cases and Their Impact

- **Challenge to DOR Rule-Making Authority:** In two cases, the Association of Washington Business (AWB) has challenged DOR's authority to promulgate interpretative administrative rules arguing that the Legislature repealed that authority in regulatory reform legislation enacted in 1995. In May 2004, Division II of the Court of Appeals held that DOR has inherent authority to issue interpretative rules. AWB is seeking review by the Supreme Court.

- **Retail Sales Tax and Hotel Furnishings/Amenities:** Mayflower Park Hotel challenged an assessment by DOR of sales tax for furnishings and amenities it purchased and provided for its guests' use. Division II of the Court of Appeals upheld the assessment, concluding that when a hotel buys furnishings or amenities for its guests to use, it is engaging in a "retail sale" for which it must pay sales tax.

## Revenue, Bankruptcy and Collections Division

**Estate Tax:** A class action lawsuit challenges the administration of Washington's estate tax. The class plaintiffs assert that Washington's estate tax is "coupled" with the federal estate tax and that the significant changes to the federal estate tax Congress enacted in 2001 necessarily apply with respect to Washington's estate tax so as to reduce or eliminate the amount of estate taxes that must be paid to the state under the credit provisions of the federal estate tax. In December 2003, the Thurston County Superior Court held that the state's estate tax is tied to the pre-2001 version of the federal estate tax and that the revisions to the federal estate tax in 2001 did not affect the continuing vitality of Washington's estate tax. The Supreme Court granted direct review and heard oral argument in September 2004. A decision is expected in early 2005.

**Out-of-State Manufacturers:** Also before the courts are a number of significant refund claims brought by out-of-state manufacturers and product suppliers to Washington manufacturers in which these taxpayers contend that the sales of such products, in fact, occur outside the state and thus are exempt from the business and occupation tax.

**Pipeline Valuation:** The Kittitas County Superior Court upheld DOR's valuation of Northwest Pipeline's operating property for the 2001 assessment year. The court concluded that the pipeline failed to demonstrate that DOR's "approaches in valuing [the pipeline] were systematically and fatally flawed."

**In early 2004, the Department of Energy's Office of Civilian Radioactive Waste Management paid approximately \$6.8 million to the State of Washington after DOE's Office of Hearings and Appeals (OHA) ordered the payment pursuant to the Nuclear Waste Policy Act of 1982.**

## Major Issues and Events

**Payments Equal to Taxes:** In early 2004, the Department of Energy's Office of Civilian Radioactive Waste Management paid approximately \$6.8 million to the State of Washington after DOE's Office of Hearings and Appeals (OHA) ordered the payment pursuant to the Nuclear Waste Policy Act of 1982 for site characterization activities conducted at Hanford during the mid-1980s to determine Hanford's suitability as a possible nuclear waste repository. The Revenue Unit represented the state in the proceedings before OHA.

**Implementation of Tobacco Settlement:** The Revenue Unit plays an important role in the implementation of the historic tobacco litigation settlement agreement. The unit enforces the "escrow" statute adopted by the Legislature that applies to cigarette manufacturers selling tobacco products within the state which have not joined the master settlement agreement. The amount that must be put into escrow is based on product sales each year and protects the fiscal soundness of the state and the public health. Diligent enforcement of the escrow statute insulates the settlement payments received by the state under the master settlement agreement from being reduced based on the non-participating manufacturers' (NPM) adjustment. This adjustment applies if there is an increase in the NPM's market share resulting from the implementation of the master settlement agreement.

The unit also helps maintain the Attorney General's Office website required by a 2003 law under which tobacco product manufacturers must certify to the AGO prior to selling its cigarettes in this state. Tobacco manufacturers

## Revenue, Bankruptcy and Collections Division

**The Bankruptcy and Collections Unit (BCU) encourages voluntary compliance with the state's tax laws by supporting the efforts of state agencies to aggressively pursue money owed to the state.**

- whose certifications have been approved can be found at [www.atg.wa.gov/tobacco](http://www.atg.wa.gov/tobacco).

### ● **Bankruptcy and Collections Unit**

### ● **Summary of Responsibility**

- The Bankruptcy and Collections Unit (BCU) encourages voluntary compliance with the state's tax laws by supporting the efforts of state agencies to aggressively pursue money owed to the state. Most of the money is owed for delinquent sales and business and occupation taxes, industrial insurance premiums and unemployment fund contributions.

- The BCU gives priority to representing the Departments of Revenue, Labor & Industries, and Employment Security in bankruptcy cases. Assistance has also been provided to other agencies including Agriculture, Community Trade & Economic Development, Corrections, Financial Institutions, Ecology, Health, Higher Education Coordinating Board, Licensing, Parks & Recreation, Natural Resources, Social & Health Services, State Investment Board, State Patrol, Transportation, University of Washington, Washington State University, Utilities & Transportation Commission, and the AGO Consumer Protection Division.

### ● **Legal Services Provided**

- The vast majority of the BCU's work consists of handling bankruptcy litigation in cases under chapter 11 ("corporate reorganizations") and chapter 13 (cases involving regular income from small businesses or jobs) of the federal Bankruptcy Code. The BCU attorneys provide legal services at all stages of a bankruptcy case. A typical case would include appearing early on behalf of the agency, obtaining all financial information necessary to analyze the agency's claims, asserting secured or trust fund status, if appropriate, and defending any challenges to agencies' claims. The BCU attorneys review proposed bankruptcy plans to ensure proper treatment of agency claims, enforce payment when taxes or payments under court-approved plans are delinquent, and also review proposed sales to ensure that taxes are not avoided.

- Although highest priority is given to bankruptcy cases, the BCU handles a significant number of collection actions against the bonds of contractors who are delinquent in tax payments. The BCU also devotes substantial resources to training tax agency personnel who handle bankruptcy and collections claims.

### ● **Numbers/Trends**

- A total of 12,881 bankruptcy and collections cases have been handled on behalf of the state since the BCU was created in 1993. The BCU has collected more than \$113 million, including \$76.7 million in payments made, \$11.9



# Revenue, Bankruptcy and Collections Division

million in claims successfully defended, and \$24.9 million in future payments to be made to the state under court orders. The BCU currently has 499 active cases with a total of \$11 million in agency claims.

**The BCU currently has 499 active cases with a total of \$11 million in agency claims.**

## Significant Cases and Their Impact

**Taxation of Bankruptcy Sales:** The BCU continues to challenge proposals by debtors seeking to exempt the sale of assets in bankruptcy from state taxation. Although the Bankruptcy Code exempts collection of a "stamp or similar tax" on the sale of property in a confirmed bankruptcy case, courts had expanded that exemption to real property sales occurring prior to confirmation of a plan and debtors sought to expand it to include sales and use tax assessed on personal property. Some of the cases in which objections resulted in cash recoveries were CP Acquisition Co. (\$341,955), Spiegel, Inc. (\$676,400), and Viasource Communications, Inc. (\$171,817).

**Public Works Projects:** In public works contracts, state law requires the governmental entity to retain a percentage of the contract payment and hold it in trust for certain creditors of the contractor. The BCU represents the Department of Revenue and brings action when taxes are owed by the contractors. Examples of cases in which the BCU successfully recovered money include Granquist Construction (\$175,556), Quillayute Valley School District (\$110,662), and City of Kent (\$68,000).

## Major Issues and Events

The BCU worked with the tax agencies, Ecology and DSHS to propose amendments to SB 6189, the WSBA Creditor/Debtor Section's major rewrite of state receivership law. The major benefit for the tax agencies is that a claim for unpaid taxes during the receivership can be filed against the trustee's bond. Ecology obtained language limiting the right to abandon property containing hazardous waste, and DSHS obtained priority for unpaid child support obligations.

BCU recovered more than \$23.5 million in 2003, its highest annual recovery ever. The chief beneficiary of the money was the General Fund, as more than \$19.6 million was collected for the Department of Revenue.

# Torts Division

**The Torts Division prevails at trial in more than three out of four cases tried. However, verdicts in cases lost by the state have increased markedly due to nature of the injuries for which the state is now held liable.**

## ● Summary of Responsibility

- The Torts Division defends tort claims and lawsuits against all state agencies, officers and employees. The majority of cases are based on actions brought
- under theories of liability for state actions such as highway design, release of inmates, injuries on state property, medical malpractice, employment,
- child care and custody, auto accidents, maritime injuries, false arrests and unreasonable force. Tort attorneys also provide legal and risk management
- advice to the Office of Financial Management and state agencies on tort matters.

## ● Legal Services Provided

- The primary legal service provided by the Torts Division is the resolution of damage claims against state agencies and employees. Many cases are
- resolved through successful pretrial motions, saving the state significant resources in research, discovery and investigations. Historically, the division
- resolves an average of over 50 percent of cases with no payout of state funds. The remaining cases are evaluated for settlement after pre-trial discovery
- and investigation. If possible, cases are settled through direct negotiation, or mediated negotiation. Cases that cannot be settled, or those which are
- inappropriate for settlement due to lack of liability, are tried before juries. The Torts Division also handles all appeals resulting from those cases.

## ● Numbers/Trends

- The Torts Division is currently handling approximately 585 cases. Over the last five years the complexity of cases rose dramatically. In 1991 only 22
- complex lawsuits were filed. In 2004 there were over 100 complex cases filed against state agencies. Investigators handle approximately 500 pre-
- lawsuit claims for damages each year. The division resolved 55 percent of the cases with no payout of state funds in fiscal year (FY) 2004. Forty-
- three percent were settled and the other 2 percent were tried before juries or arbitrated.

- The Torts Division prevails at trial in more than three out of four cases tried.
- However, verdicts in cases lost by the state have increased markedly due to nature of the injuries for which the state is now held liable. In FY 2002, the
- division tried 29 cases to verdict. There were 17 defense verdicts, 3 hung juries and a mistrial. The remaining verdicts totaled \$1.5 million. Two of
- those cases are on appeal. In FY 2003, 17 cases were tried to verdict and 13 were defense verdicts. The remaining cases resulted in payouts of \$1.1
- million. In the FY 2004, the Torts Division tried 19 cases to verdict. Seven were defense verdicts of which only one is on appeal. There were 11 plaintiff

## Torts Division

verdicts and 1 is on appeal. Payouts on these trials totaled \$425,547. This represents a reduction in payouts for trials of over 50 percent from the last year.

The division created a Torts Appellate Program in 2001, which in FY 2004 handled 25 cases to resolution with a 96 percent win/loss ratio. Over the last five years, the division has averaged a win/loss ratio on appeal of 90 percent. The team is made up of a supervising attorney, two assistant attorneys general, three paralegals and professional staff. The team not only handles significant appeals but also consults on significant motions and jury instructions.

The division has seen large increases in employment cases and they now reflect nearly 25 percent of the division's workload. Litigation against DSHS social workers and social service programs, particularly those dealing with children is another increasing caseload. These are areas of relatively new state liability, as recognized by the courts, and it is expected that litigation in these areas will continue to grow in volume, complexity and potential dollar exposure to the state. In the past several years, the Court of Appeals has issued four more decisions, which will increase DSHS liability for child protective activities.

Total payouts on tort claims and lawsuits were reduced in FY 2004 by nearly 70 percent from FY 2001. In 2001 payouts were over \$80 million dollars as a result of a few large verdicts and payouts. The total in FY 2004 was only \$23.9 million. In FY 2002 and FY 2003 the payouts were at \$31 million and \$40 million respectively. The large reduction in payouts is a result of increased staffing and experience in the Torts Division and some favorable cases which were decided in the appellate courts.

Experienced torts attorneys not only attempt to limit the amount of tax dollars spent in tort payouts, but they also provide advice, training and other cost saving assistance to agencies in the areas of risk prevention, planning and management.

## Significant Cases and Their Impact

**Joyce v. Department of Corrections:** Mrs. Joyce was tragically killed in an auto accident caused by an offender on supervision by the Department of Corrections (DOC) for a domestic violence offense. Unbeknownst to DOC he stole a vehicle and sped through Tacoma striking the Joyce vehicle at a high rate of speed. Plaintiffs' allege that the state should be liable for failing to prevent the accident under the theory that supervision for a domestic offense should also included the duty to control the offender's future criminal behavior. The appellate court held that there was a duty to control all future criminal behavior of such an offender because his acts were foreseeable. The state petitioned to the Supreme Court for review of this Court of Appeals decision. That request was granted and the case has been argued but not yet decided by the Supreme Court.

**Total payouts on tort claims and lawsuits were reduced in FY 2004 by nearly 70 percent from FY 2001.**

## Torts Division

### Major Issues/Events

**Wrongful Adoption Cases:** Several years ago there were approximately 15 “wrongful adoption” cases pending against DSHS and its caseworkers. The claim was that caseworkers were negligent in not fully disclosing psychological or emotional problems of children before adoption. The parents generally sought damages for their emotional distress in raising the children and large damages for care and treatment of adopted children. Many of the lawsuits alleged that the children had Fetal Alcohol Syndrome. The state has settled some of these cases and some have been dismissed. The state won two others at trial, one of which was appealed to the state Supreme Court. The court affirmed the defense verdict in favor of the state. However, the court, unlike courts in most other states, did generally approve the legal basis for filing this kind of lawsuit against the state and adoption agencies. More of these lawsuits are now being filed and some are going to trial.

**Dependency Cases:** State law provides that DSHS can obtain a court order allowing temporary foster care for children who are suspected of being victims of abuse or neglect. DSHS, with legal assistance from this office, handles thousands of these dependency cases every year. In some cases, the courts ultimately decide to remove children from their parents permanently or for extended periods of time. However, in many cases children are returned to their parents after investigation or professional examination reveals that abuse likely did not occur. In the past it has always been thought that the state had no liability for obtaining temporary court orders to protect children. Recently, however, the courts have ruled that parents can sue and argue that the state “negligently investigated” the allegations of abuse or neglect which led to the court order for temporary foster care.

Juries have been awarding hundreds of thousands of dollars in these cases. This is a major legal development because there are hundreds of cases every year in which the state might now be sued for placing children in protective foster care.

**Early Resolution Program:** The Torts Division has initiated an early resolution program. The goal of the program is to try to achieve savings by early negotiation of lawsuits and claims arising from incidents for which the state is likely to be held liable if the matter goes to court. If the program is successful some savings in legal defense costs should be possible and some cases might also have lower settlement costs because the plaintiff or claimant has incurred lower legal costs.

**“Parole” Liability Cases:** In 1992, the state Supreme Court held that the Department of Corrections could be liable for crimes committed by released offenders who were under state post-release “supervision.” This has produced a huge increase in payout. In 1997, there was a large (\$6.5 million) verdict against the state in one of these cases and in 1998 the state Supreme Court reaffirmed its decision allowing this liability and extended the liability to local government “probation” supervision. As a result of these developments there has been a large increase in lawsuits against the state by victims of crimes by released offenders under state supervision. The state now has almost three dozen lawsuits and claims pending against it

## Torts Division

for murder, rape, and other serious crimes by released offenders. Many of these suits represent multi-million dollar loss exposures for the state. The *Joyce* case mentioned earlier led to a verdict of nearly \$23 million and is on appeal to the Supreme Court of Washington State. The plaintiff in that case is alleging that the DOC is liable for future crimes of offenders even if their previous crimes were of a completely different nature. The office is awaiting the Supreme Court's decision.

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# **Strengthening Washington's Education System**

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# Education Division



## Summary of Responsibility

The Education Division provides a full range of legal services to more than 50 education-related clients, including: 3 regional universities; The Evergreen State College; 28 community colleges; 5 technical colleges; and other education-related boards, such as the Higher Education Coordinating Board, the State Board for Community and Technical Colleges, the Council of Presidents and the Center for Information Services. In addition, the division serves the Office of the Superintendent of Public Instruction, nine area-wide educational service districts, the State Board of Education, the Academic Achievement and Accountability Commission, and the Professional Educator Standards Board.

The division has nine attorneys located in offices in Olympia and Seattle. It also coordinates the work of 14 attorneys in the regional offices who do legal work, either full or part-time, for educational institutions in the vicinity of those offices.

**Enrollment and employment at the regional universities, The Evergreen State College, and the community and technical colleges have increased significantly, leading to more student and personnel-related legal matters.**

## Legal Services Provided

The workload of the division is extremely diverse. Division attorneys advise on matters as varied as constitutional rights, labor/management disputes, employee rights, student rights and responsibilities, discrimination and sexual harassment, public contracting, intellectual property, and general public sector business issues. Attorneys also represent their education clients at hearings on a variety of education-related matters, including prosecution of teacher misconduct, consumer complaints against private vocational schools, labor arbitrations, and employee and student misconduct hearings. In serving the Higher Education Coordinating Board, the State Board for Community and Technical Colleges, and the Superintendent of Public Instruction, the division handles a wide variety of legal issues associated with both the K-12 and higher education systems, taking into account many federal as well as state laws.

## Numbers/Trends

The workload of the division has substantially increased during the current biennium. Enrollment and employment at the regional universities, The Evergreen State College, and the community and technical colleges have increased significantly, leading to more student and personnel-related legal matters. Attorneys devote about 30 percent or more of their time to hearings and litigation involving administrative hearings, arbitrations, and cases before the U.S. District Court, Superior Court, Court of Appeals, and the state Supreme Court.

## Education Division

**Two class actions alleging violations of wage and hour and overtime laws were successfully defended. Two other class actions for unpaid retirement and health care benefits for part-time faculty were settled when the Legislature appropriated funds and the settlements received court approval.**

### Significant Cases and Their Impact

**Initiative 732:** In December 2002, the Supreme Court held that Initiative 732 clearly intended to include locally-funded employees in cost-of-living increases. In a follow-on suit, *Brown and WEA v. State*, the plaintiffs challenge the Legislature's decision to fund two Learning Improvement Days instead of three, alleging a violation of I-732; Article II, section 19 ("single subject" rule); and the state's constitutional "basic education" obligation. The state is appealing from an adverse trial court decision.

**Class Action Challenges to College Administrative Practices:** There have been several lawsuits challenging personnel and administrative practices by the State Board for Community and Technical Colleges, the Department of Retirement Systems, or the Health Care Authority involving part-time community and technical college faculty. Two class actions alleging violations of wage and hour and overtime laws were successfully defended. Two other class actions for unpaid retirement and health care benefits for part-time faculty were settled when the Legislature appropriated funds and the settlements received court approval.

**Washington State Schools for the Deaf and Blind:** Teachers at the Washington State School for the Deaf and the Washington State School for the Blind have filed a class action under unpaid wage statutes contending that the schools' salary practices did not conform to those offered by the local Vancouver School District, as required by state law, insofar as the schools do not pay supplemental salaries for additional time, responsibilities, or as an incentive (or "TRI" payments).

**School Funding Litigation:** In a case with significant monetary and policy implications, a coalition of school districts has filed suit in Thurston County Superior Court challenging the Legislature's special education funding formula and the Safety Net Program. No trial date has been set.

### Major Issues/Events

Because client agencies are dealing with reduced budgets, the division's workload has increased to assist them to cope with budget-related issues. It, therefore, has become even more important for the division to work more efficiently.

Regionalization of services has allowed clients easier physical access to their attorneys which results in many matters being resolved before they involve litigation. It also requires close coordination among the attorneys in order to maintain consistent advice.

# University of Washington Division



## Summary of Responsibility

The University of Washington Division provides legal services to the University of Washington in Seattle, with campuses in Bothell and Tacoma. The university currently has over 39,000 enrolled students. It is one of the largest employers in King County, with about 22,000 staff and 6,500 teaching and research faculty. The university operates two hospitals, University of Washington Medical Center and Harborview Medical Center.

**There are 103 active lawsuits and 43 active administrative cases involving the university and its affiliated hospitals and officials.**

## Legal Services Provided

The university has all the legal issues of a large state agency, many of the legal issues of a large corporation, and many legal issues unique to higher education. Accordingly, the division must provide a broad spectrum of legal advice and representation, including employment law, labor relations, student affairs, real estate, land use, environmental, intercollegiate athletics, public finance and bonding, contracts, intellectual property, tax, employee benefits, constitutional law, gifts and trusts, and health care law. In addition, the division coordinates with assistant attorneys general representing the other colleges and universities in the state. The division also works with attorneys from the Torts Division and with special assistant attorneys general handling specialized cases.

## Numbers/Trends

There are 103 active lawsuits and 43 active administrative cases involving the university and its affiliated hospitals and officials. About half of the lawsuits are medical malpractice cases. The remaining cases involve disputes on construction projects, claims of statutory violations, personal injuries, and employment issues, among others.

The following trends have increased demand for legal advice and representation:

- The UW's medical centers, like all other health care providers, are heavily regulated and closely monitored by federal and state agencies concerning Medicare and Medicaid billing, patient privacy, research practices, and other subjects. Both the medical centers and the division are devoting greatly increased resources to ensuring compliance and responding to regulatory inquiries.
- As a result of Washington's Civil Service Reform Act of 2002, full collective bargaining rights for large segments of university employees have now been added to the already-complex web of federal, state, and

- Increased enrollment and federally-funded research continues to create pressure for growth on and off the university's main Seattle campus. The division has worked closely with the university in negotiations, and sometimes litigation, with community groups, in seeking permits for various projects, in drafting contracts with other governments and businesses, and in planning and contracting for various facilities.
- The university's leadership role in scientific and technical research, computing and communications development, and other high technology has significantly increased requests for advice on intellectual property issues. These include copyright, licensing of technology, and access to computer-based information.

**Medical Regulatory Compliance:** Federal and state regulations on billing, research, business relationships, patient care, practitioner certification, and privacy are extremely complex and constantly evolving. The UW has been the target of close scrutiny by regulators in these areas. Because the university has two hospitals and vast research operations, this is a demanding, high-stakes focus of our work.

**Athletics:** Intercollegiate Athletics at the UW is emerging from a tumultuous period of internal and external investigations, administrative and coaching changes, NCAA charges, and litigation. The division is continuing to be deeply involved in all these matters. Among these pending matters are lawsuits in which the former head coaches of football and softball are challenging removal from their positions.

**Employment:** With its large workforce, the university is subject to a range of claims by individuals and classes of employees. Currently, these include suits by a group of medical interpreters contending they were wrongfully misclassified as independent contractors and a lawsuit seeking to represent a large class of faculty members who feel they were improperly denied a salary increase in 2002.

# Washington State University Division

## Summary of Responsibility

The Washington State University Division provides legal services to the state's land grant university from the main campus in Pullman. The division's five attorneys, with support from attorneys in other divisions in specialized areas such as employment and construction law, provide legal services to the main campus, the three branch campuses (Spokane, Tri-Cities, and Vancouver), agricultural research and extension operations statewide, and extension field offices in every county.

## Legal Services Provided

Division attorneys provide advice on a host of legal issues, many of which are unique to an academic environment. Attorneys frequently provide advice on issues relating to: the university's research efforts, including its research agreements with the federal government and/or private sponsors, faculty research, and faculty ownership and use of intellectual property; the university's statewide Cooperative Extension Program (including 4-H programs); athletics and NCAA compliance; various student rights and programs; state residency for tuition purposes; all aspects of personnel/employment law, including faculty tenure and promotion; university development; environmental health and safety; public contracting; constitutional rights; veterinary training and services; and capital planning and development, as well as operation of facilities. Division attorneys also provide representation on non-tort related litigation in a variety of forums.

## Numbers/Trends

Division workload continues to grow as the university continues to grow and expand its branch campus programs and its research efforts. Over 23,000 students currently are enrolled at the main campus in Pullman and branch campuses in Spokane, Tri-Cities, and Vancouver. Washington State University employs approximately 6,900 individuals, including personnel located at research stations, county extension offices, and learning centers. The university is nationally recognized for its research in areas ranging from biotechnology and computer design to wood product use and agricultural marketing, and its research efforts are growing. During the past year, the university obtained more than \$125 million in external research funding, an increase of more than \$8 million over the previous year (\$20.5 million over the last 2 years).

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# **Protecting the Public**

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# Criminal Justice Division

**The CJD provides state and nationwide investigative expertise and assistance through the office's Homicide Investigation and Tracking System (HITS) Unit, and through the investigators and crime analysts who are part of HITS.**

## ● Summary of Responsibility

- The mission of the Criminal Justice Division (CJD) is to work with and support its partners in the criminal justice community and to work towards creating safe communities. The Criminal Justice Division staff represent and advise the Department of Corrections (DOC), Indeterminate Sentence Review Board (ISRB), Washington State Patrol, Governor's Clemency and Pardons Board, the Governor's Office on extraditions and detainers, and the Criminal Justice Training Commission. The division investigates and prosecutes Medicaid fraud and resident abuse, environmental crimes, and tax fraud cases on behalf of the Department of Revenue, and mortgage and lender fraud cases on behalf of the Department of Financial Institutions.
- The CJD civilly prosecutes previously convicted sexually violent predators who have served their criminal sentence and who still pose a serious threat to re-offend. The CJD also responds to all federal habeas corpus petitions that result from state felony convictions, including capital cases. Upon request from the Governor, local law enforcement and local prosecutors, the division investigates and prosecutes criminal cases throughout the state and provides investigative and prosecutorial support to local law enforcement and prosecutors in computer and high tech related crime. The CJD provides state and nationwide investigative expertise and assistance through the office's Homicide Investigation and Tracking System (HITS) Unit, and through the investigators and crime analysts who are part of HITS.
- The CJD also serves several other criminal justice clients. Among these are the Jail Industries Board, State Toxicology Lab, Sentencing Guidelines Commission, and State Forensic Investigation Council. Finally, the CJD represents the state in reimbursement claims that result from self-defense acquittal claims.

## ● Legal Services Provided

- **Corrections/Civil Rights Unit:** This unit represents DOC and its employees in state and federal court litigation. Actions handled by this unit often involve inmate constitutional rights claims associated with conditions of confinement, access to courts, freedom of speech, or due process of law and personal restraint petitions filed by inmates challenging administrative or disciplinary action taken against them by DOC. Other litigation includes public disclosure, some tort actions, and other miscellaneous cases in Superior Court. This unit also provides advice and training for DOC staff in many areas including: search and seizure, access to courts and public disclosure. Attorneys in this unit also review draft DOC policies and contracts for legal sufficiency.
- **Sentencing/Habeas Corpus Unit:** This unit represents the state and DOC in challenges to the fact or duration of confinement resulting from a

## Criminal Justice Division

state court felony conviction. A key responsibility of this unit is to represent the state in federal habeas corpus litigation brought by state prisoners, including those under a death sentence. Unit staff represent DOC in post sentence petitions, which involve correcting errors in criminal judgments and sentences. They also represent the ISRB in challenges to its discretionary decisions relating to release of offenders under its jurisdiction. Finally, the unit advises the Governor's Office on clemency and pardon matters and on interstate extradition matters.

**Medicaid Fraud Control Unit (MFCU):** The MFCU is a federally mandated and funded investigative and prosecutorial unit staffed by attorneys, auditors, investigators, and support personnel. The mission of the unit is to investigate and prosecute both fraud by health care providers that illegally divert Medicaid funds and the criminal abuse and neglect of residents in Medicaid funded facilities. The unit provides valuable assistance to local law enforcement in investigating and prosecuting crimes committed against vulnerable adults. The unit trains cadets at the Basic Law Enforcement Academy, other investigative agencies, and helps to coordinate the efforts of local vulnerable adult task forces whose missions are to improve the response to crimes committed against this population. The unit maintains and updates a statewide vulnerable adult contact network with all state law enforcement agencies. This contact network assures that the Department of Social and Health Services resident abuse referrals go to the appropriate law enforcement agency; that each agency understands its role; and offers AGO/MFCU support for each investigation.

**Sexually Violent Predator Unit (SVP):** The SVP Unit was established in 1990 following enactment of RCW 71.09 which permits the involuntary civil commitment of sex offenders who, because of a mental abnormality and/or personality disorder, are likely to commit predatory acts of sexual violence if released to the community.

The unit is responsible for prosecuting sex predator cases for 38 of Washington's 39 counties (King County being the exception). The expertise of the unit permits it to handle all aspects of sex predator cases, including pre-filing investigations, pre-trial motion practice, trial, post-commitment proceedings and appeals. Attorneys appear before both state and federal courts. The unit also employs two investigators who work with the attorneys and paralegals to identify and locate witnesses and otherwise prepare cases for filing and trial.

**Homicide Investigation and Tracking System Unit (HITS):** HITS is a program within the Criminal Investigations Unit of the Attorney General's Office that tracks, investigates and maintains a searchable database of homicides, rapes and other violent crimes. It is the only statewide central repository for information relating to violent crimes. Investigators have collected and entered data from more than 8,000 murder investigations, more than 7,900 sexual assaults, and over 56,500 other major crime data. Investigators utilize the HITS database to assist local law enforcement in the investigation of violent crimes. HITS is also a national leader in developing and using computers in innovative ways to prevent and increase the solvability of crimes. It has been the recipient of several grants to study

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## Criminal Justice Division

- trends or common characteristics in violent crimes, and provides training to local law enforcement. The HITS unit also plays a pivotal role in the criminal justice system in Washington through the training it provides to state and local law enforcement. Finally, HITS investigators may be called upon to review murder and rape cases from around the state.
- **Criminal Litigation Unit (CLU):** When requested by the Governor, county prosecuting attorneys or the Organized Crime Intelligence Unit of the Washington State Patrol, the CLU investigates, assists with and prosecutes complex criminal cases. These types of cases include multi-county crime, white-collar crime, governmental corruption or cases where the local prosecuting attorney has a conflict of interest. This unit may also assume responsibility for the appellate review of a criminal case originally brought by a county prosecutor if that case involves fundamental issues affecting the public interest and the administration of justice. Operating as part of the CLU are the Environmental Crimes Unit, Financial Crimes Unit and High Tech Unit.
- The Environmental Crimes Unit investigates and prosecutes significant criminal violations of our state and federal environmental statutes. This is accomplished in conjunction with a joint criminal investigation task force comprised of investigators and agents from the state Department of Ecology and the U. S. Environmental Protection Agency.
- The Financial Crimes Unit is funded by the Washington Department of Revenue and the Department of Financial Institutions. These cases generally involve the statewide investigation and prosecution of tax fraud and mortgage fraud cases, generally consisting of false statements and theft crimes committed against the state or individuals. The unit also assists state agencies in the areas of fraud detection and training.
- The High Tech Unit was created in 1999 to assist local law enforcement and county prosecuting attorneys in their efforts to respond to complaints of computer-related crime and to educate and promote the protection of the citizens and institutions of the state of Washington from the use of computers, technology and the Internet for criminal enterprises. Through the creation of this unit, the Attorney General's Office has acquired expertise in prosecution of Internet and computer crimes.

## Numbers/Trends

- **Corrections Unit and Sentencing/Habeas Corpus Unit:** In 2004, the DOC's "in custody" population reached 17,149 inmates. These inmates are housed in DOC's 13 prisons and 18 pre-release and work-release facilities, as well as in rented in-state and out-of-state beds. In addition, DOC has over 66,800 offenders subject to its jurisdiction. In 2004, there were approximately 935 new cases and referrals opened on the combined dockets of the Corrections and Sentencing Units including: 210 habeas corpus cases (of which about 100 were appeals); 125 civil rights cases (of which 35 were appeals) in federal court; 20 civil rights cases in state superior courts; 300 personal restraint petitions; 175 post sentence referrals for DOC; 14 public disclosure cases; 3 self-defense reimbursement cases; and 22 miscellaneous

## Criminal Justice Division

cases. Approximately 340 cases were closed during 2004. Increases in the offender population and the existence of limited in-state inmate housing are expected to continue to drive increases in the demand for legal services.

Nine individuals are currently under sentence of death in the state of Washington, and there are several cases either under prosecution at the state trial court level or at the investigation level pending a decision whether to seek the death penalty. The unit has an expanded role in assisting local jurisdictions in defending capital sentences at the state direct appeal and personal restraint petition stages. These potential new cases, together with the three active death penalty cases currently being handled by the division, will strongly influence the future workload of the division.

**Medicaid Fraud Control Unit:** The MFCU concluded a number of fraud and resident abuse investigations with the filing of charges, and the referral of cases to county prosecutors for their review and action. In 2004, the MFCU received approximately 391 new cases; of those about 183 were resident abuse and 208 were fraud. The unit, with its federal partners, concluded fraud cases resulting in approximately \$13.2 million in restitution, investigative costs, fines and overpayments being ordered.

**Criminal Litigation Unit:** In 2003, 27 cases were referred to the CLU for prosecution. In 2004, approximately 39 cases were referred for investigative or prosecution assistance, including 6 homicide cases. The unit also spent approximately 135 hours in 2004 rendering informal assistance on criminal matters.

Representation of the Criminal Justice Training Commission (CJTC) increased in 2003 and again in 2004 when amendments to RCW 43.101 took effect and included sections requiring peace officer certification as a condition of employment. The CLU represents CJTC in denial of certification and decertification matters. In 2004, the unit received 22 cases for review. The attorneys representing the CJTC publish the Law Enforcement Digest, an important source of criminal case law for police officers in this state. They also received 75 requests for assistance related to CJTC.

In the representation of the Washington State Patrol during 2004, CLU attorneys fielded about 400 requests for client advice, reviewed 78 contracts, represented the client on 45 subpoenas and/or motions, handled 45 requests relating to public disclosure issues, and handled 78 calls relating to the WSP from outside that agency.

As a result of the work of the Financial Crimes Unit, since 2001, a total of 21 defendants have either been convicted of or charged with felony crimes, most with multiple felony counts. A total of \$2,786,205.80 in restitution owed to the Department of Revenue has been ordered by the courts, and of that amount, \$990,887 had been collected prior to sentencing. One case is currently pending trial and another is pending sentencing. It is expected that the total restitution ordered will exceed \$3.4 million when pending cases are factored into this calculation.

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## Criminal Justice Division

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- The High Tech Unit continues to refine the role it seeks to play in the criminal justice arena. The HTU has been very active in Internet training for law enforcement, parents, and children. The HTU has received approximately eight requests for general assistance and given 32 hours of training in 2004.
- **Sexually Violent Predator Unit:** Washington was the first state to enact a sexually violent predator law to protect its most vulnerable citizens from predatory sex offenders. Since 1990, many other states have used Washington's sex predator law as a model in enacting similar statutes. The unit has been able to provide assistance to these other states because of its vast experience dealing with sexually violent predators.
- Approximately 39 cases were referred to the unit in 2004 to determine whether to initiate a sexually violent predator action seeking the civil commitment of those persons. The unit filed about 19 such actions. In 2004, the unit also obtained commitments in every case that was tried, dismissed 2 cases and handled 76 Annual Review Proceedings. One individual was released to Less Restrictive Alternatives in 2004. In addition, while 16 appeals were closed, another 24 new appeals were opened.
- **Homicide Investigation and Tracking System Unit:** The HITS database currently contains information from 8,086 murder files, 7,920 sexual assault files and 56,769 pieces of data from other major crimes.
- The demands on HITS continued to increase in 2004. HITS received approximately 851 Requests for Information (increase of 12 percent) from law enforcement agencies. The requests included name searches, case comparisons, analysis/profiling, verification of informant information, resource information, and vehicle searches. Also, about 317 Bulletins (increase of 41 percent) were distributed to 2,037 locations in Washington, Oregon and British Columbia. In addition to the above, HITS investigators were actively involved in providing assistance in:
  - **Gary Ridgeway/Green River Killings:** The HITS unit responded to several inquiries from the Green River Task Force for information from its database that was utilized to confirm and/or deny information obtained in the later stages of this investigation.
  - **Triple Homicide, Raymond, Pacific County:** HITS unit investigators provided direct assistance in this investigation, including the development of a timeline of critical dates, researching information for the prosecution, and participation in interviewing one of the murder suspects.
  - **King County Murder Suicide:** The King County Sheriff's office asked the HITS unit to conduct an independent review of their investigation of a murder/suicide that took place in December 2003.



## Criminal Justice Division

### Significant Cases and Their Impact

#### Medicaid Fraud Control Unit

This year the Washington State MFCU took a leadership role or participated in investigating, prosecuting or negotiating the multi-state settlements of four national cases:

- **Columbia HCA II:** This case was the second and final phase of the prosecution of the largest hospital chain in the country. The total recovery (criminal/civil and state/federal) for both phases was over \$1 billion. Washington State's share of the second phase was \$62,124.
- **Bayer II:** This case was a Medicaid rebate (best price) prosecution and civil settlement. Bayer pled guilty to a scheme of repackaging its drugs so as to avoid paying the states an appropriate rebate. Washington State's share of the settlement was \$3.7 million.
- **Rite-Aid:** This is a large national pharmacy that settled civil allegations it systematically short filled and split scripts for billing to the Medicaid program. Washington State recovered \$213,319 in damages and penalties.
- **Schering-Plough Corp.:** This case involved a criminal and civil settlement of the company's illegal marketing of its drug Claritin. This marketing resulted in the defendant not paying its statutory rebate to the Medicaid program. Washington State's recovery was \$3.57 million representing restitution and penalties.

In addition, many state cases were prosecuted. These include:

- **United States ex rel. Erickson v. UWP:** This case was a civil settlement of a federal False Claims Act case (qui tam) alleging fraudulent billings to the Medicare and Medicaid programs by the University of Washington Medical School. Two teaching physicians were convicted as a result of the five year investigation and prosecution. The total settlement was \$35 million and Washington State Medicaid Program's restitution and recovery was \$5 million.
- **State v. Hudkin:** This pharmacist billed the state's Medicaid program for prescriptions he did not provide to Medicaid beneficiaries. He was sentenced to 38 months in prison and ordered to repay \$308,000 in restitution.
- **State v. Lee:** The defendant, a dentist, billed the Medicaid program for services not provided to Medicaid beneficiaries. He was sentenced to 6 months electronic home detention and ordered to repay \$175,000 in restitution.

**This pharmacist billed the state's Medicaid program for prescriptions he did not provide to Medicaid beneficiaries. He was sentenced to 38 months in prison and ordered to repay \$308,000 in restitution.**

## Criminal Justice Division

### ● **Home Health Care and Adult Family Home Care Providers**

- The MFCU prosecuted 14 personal care providers for schemes including: falsifying hours allegedly worked; billing for deceased beneficiaries; lying in order to qualify as a care provider; pre-billing hours not performed; theft of funds; billing for alleged home care of a beneficiary who was in jail; billing for home care of a beneficiary who was actually in a hospital; and billing for the home care of a beneficiary who no longer required such services. A collective total in excess of \$88,000 in restitution was ordered by the various sentencing courts and each defendant has been excluded from participating in any federally funded health care program.

### ● **Criminal Litigation Unit**

- **State v. Michelle Knotek, State v. David Knotek:** The CLU acted as co-counsel in these Pacific County triple murder cases. Michelle Knotek pled guilty to Murder in the Second Degree and Manslaughter in the First Degree and David Knotek pled guilty to Murder in the Second Degree, Unlawful Disposal of Human Remains, and Rendering Criminal Assistance in the Second Degree.

- **State v. Stein:** The CLU represented the state in this complex retrial of an 18 year old case. A five week trial resulted in guilty verdicts to three counts of Attempted Murder in the First Degree and Burglary in the First Degree.

- **State v. Pitre, State v. McKee:** The CLU served as co-counsel in this 1988 "cold case" DNA murder case. The victim was abducted in Kitsap County and found murdered in King County. Defendant Pitre pled guilty to Murder in the First Degree while defendant McKee pled guilty to Murder in the Second Degree.

- **State v. Petschl:** In this Department of Revenue referral, the defendant pled guilty to multiple felony counts for his theft of retail sales tax. The state anticipates that the restitution to be ordered by the court will be in excess of \$233,000.

- **State v. Warberg:** In this Department of Financial Institutions referral, the defendant pled guilty to two counts of felony theft for mortgage fraud. In addition to a term of confinement, restitution of \$7,245 was ordered.

### ● **Corrections/Civil Rights Unit**

- **Burton v. Lehman:** This pending case addresses whether DOC is statutorily required to pay to ship all of an inmate's property during an intra-state transfer. This case has significant financial and operational impact.

- **Nelson v. Locke:** In this pending case, a white supremacist inmate is challenging the confiscation of his "religious materials" (racial hate publications) and the requirement that he take diversity classes as violative of his First Amendment rights.

## Criminal Justice Division

**Prison Legal News v. Lehman:** In this pending case, the District Court found DOC's policy prohibiting inmates from receiving catalogs and bulk rate mail through the prison mail system unconstitutional.

**Washington Water Jet Workers Association v. Yarbrough:** The court recently found that the Class I Industries program violates the state constitution. As a result, several Class I partners have been displaced, and many inmates have lost paying jobs. The inmates' wages went to offset costs of incarceration and pay restitution to their victims.

**Sappenfield v. DOC:** Pro se inmate is challenging the Superior Court's dismissal of his public disclosure case in which inspection of the requested documents was denied in accordance with DOC policy. There are several other similar cases at the Superior Court level in which inmates request to inspect documents not in their own DOC files. A finding that the Public Disclosure Act requires DOC to collect and redact for inspection at a location accessible to the inmate, as well as provide security during inspection, would significantly impact the resources the department would have to expend to respond to a growing number of inmate requests to inspect documents not contained in the inmate's central file.

**McNabb v. DOC:** Inmate who refused to eat alleges that DOC's policy regarding forced feeding violates his constitutional rights. An unfavorable decision would increase the complexity of decisions made by DOC medical staff, with significant security and liability ramifications.

### Sentencing/Habeas Corpus Unit

**Hutchinson v. Morgan:** In November 2003, the U.S. District Court denied Darrin Hutchinson's petition for writ of habeas corpus attacking his 1989 Island County conviction for two counts of aggravated first degree murder for murdering two Island County Deputy Sheriffs. [This is the federal court proceeding following the Washington Supreme Court's denial of Hutchinson's PRP in 2002, which this office also handled.] In October 2004, a three-judge panel of the Ninth Circuit heard oral argument in the case.

**Lambert v. Blodgett:** In this case, the U.S. District Court granted Lambert a writ of habeas corpus, vacating his Grant County conviction for one count of aggravated first degree murder. The court concluded that Lambert (who was 15 at the time of his crime and 16 at the time of his guilty plea) received ineffective assistance of counsel and that his guilty plea was involuntary. The case is on appeal to the Ninth Circuit, and a three-judge panel of that court heard oral argument in March 2004.

**Brown v. Morgan:** In this capital habeas corpus proceeding, the U.S. District Court conducted a two-day evidentiary hearing concerning Cal Brown's claim that he received ineffective assistance of counsel at his King County capital trial in 1993. In September 2004, the court denied Brown's habeas petition in its entirety, upholding his conviction and death sentence. The matter is now on appeal to the Ninth Circuit.

- Sanders v. Ryder:** Returned from the Ninth Circuit, the U.S. District Court held a weeklong evidentiary hearing on Sanders’ claim of ineffective assistance of counsel at his 1997 Clark County trial for child molestation.
- In re Tran/In re Roberts:** In these consolidated cases the Washington Supreme Court will decide whether the Department of Corrections is properly applying the mandatory minimum term statute for offenders convicted of first degree assault (RCW 9.94A.540(1)(b)).

# Government Compliance & Enforcement Division



## Summary of Responsibility

The Government Compliance and Enforcement Division provides legal advice to the State Auditor, State Insurance Commissioner, Department of Financial Institutions, Gambling Commission, Horse Racing Commission, Human Rights Commission, Office of Minority and Women's Business Enterprises, and Joint Legislative Audit and Review Committee. It also handles the enforcement and forfeiture litigation for the Washington State Patrol, Public Disclosure Commission, Gambling Commission, Lottery Commission, Liquor Control Board, Department of Financial Institutions, Human Rights Commission, Horse Racing Commission, Executive Ethics Board and Legislative Ethics Board. The division is responsible for the professional licensing litigation for the Department of Health. Finally, the division acts as the statutory Counsel for the Environment.

## Legal Services Provided

The division's 23 attorneys and 16 professional support staff provide a wide range of legal services to their clients. The division is divided into three sections.

The Advice and Compliance Section provides legal advice on general issues affecting government agencies such as administrative law, federal preemption of state laws and regulations, investments, contracts, finance, public records, and ethics in government service. It also provides two elected officials with a wide range of advice regarding issues that are uniquely within the scope of their constitutional and statutory responsibilities. Attorneys for the Insurance Commissioner handle enforcement proceedings, rate hearings, insolvency proceedings, public disclosure requests, and health care litigation. Attorneys for the Auditor's Office provide advice on legal compliance issues related to state and local government financial audits and state whistleblower investigations, monitor recovery efforts when fraud is reported, and handle enforcement actions that may arise from the audit process. Two attorneys from the section also are appointed as members of the State Records Committee and Local Records Committee, respectively, which are charged with approval of public record retention schedules establishing how long public records must be retained prior to destruction.

The Enforcement/Forfeiture Section prosecutes cases at the administrative level and on appeal of violations of campaign, discrimination, minority contracting, banking and securities, liquor, gambling, lottery, cigarette tax, and ethics laws. The section also handles Indian Gaming Compact advice and litigation, drug seizure litigation, and RICO/money laundering cases. Finally, section attorneys act as the Counsel for the Environment on all matters related to the siting of energy facilities.

**The Enforcement/Forfeiture Section prosecutes cases at the administrative level and on appeal of violations of campaign, discrimination, minority contracting, banking and securities, liquor, gambling, lottery, cigarette tax, and ethics laws.**

## Government Compliance & Enforcement Division

**In 2004, 356 cases were opened involving violations of state liquor and tobacco laws.**

- The Health Licensing section prosecutes health care providers for allegations of misconduct and violations of the Uniform Disciplinary Act.

### ● Numbers/Trends

- **Liquor Control Board:** In 2004, 356 cases were opened involving violations of state liquor and tobacco laws. While this number of actions may show a marked increase from the 107 cases handled in 2003, it is a reflection of joint cooperation between the Liquor Control Board and the Department of Social and Health Services concerning actions against licenses or permits for individuals who owe back child support. That joint effort is reflected in 248 of the cases. The remaining 108 cases involved over-service of alcohol, and sale of alcohol or cigarettes to minors. Twenty-four cases involved the sale of tobacco to minors and eight involved the seizure of unstamped cigarettes and vehicles transporting these cigarettes.

- **Gambling Commission:** The division handled 58 new gambling citation cases in 2004. This number remains an average as in past years.

- **Public Disclosure Commission:** The division saw a drop in matters opened in 2004 on behalf of the commission from 130 to 102. Twenty-one of the matters were enforcement based cases, thirteen were advice based and 68 outstanding penalties were submitted to the Attorney General's Office for collection. In 2004, the division continued to work actively with commission staff to reduce outstanding fines to court judgments, which were then returned to the commission staff for collection by appropriate agencies.

- **Executive Ethics Board:** In 2004, the division opened 77 cases involving charges of violations of the state ethics laws. Division attorneys provided advice and consultation on investigations and worked on settlement documents. No cases went to hearing this year. Over 190 matters are currently pending.

- **Insurance Commissioner:** In 2004, the division opened 21 new matters including enforcement actions against agents, brokers and insurers. The division also advised the agency on the legal sufficiency of many other enforcement matters. The division attorneys also handled two hearings dealing with the sale or conversion of existing insurance companies.

- **State Auditor:** In 2004, the division provided legal advice to the Auditor's Office on seven whistleblower investigations involving assertions of improper governmental action. The division also received and monitored 14 cases involving reported audit findings of fraud in state and local government. Additionally, significant attorney time was devoted to resolving a wide variety of legal compliance issues that arose during legal/financial compliance audits of state and local government agencies, minimizing the resources necessary to follow-up and enforce audit findings.

- **Washington State Patrol:** The division opened 41 matters for the State Patrol in 2004, ranging from client advice (1) to vehicle impound challenges (5) to terminal audits (2) to vehicle identification (9) to drug forfeiture



# Government Compliance & Enforcement Division

actions (28). More than \$125,000 in cash, real property and vehicles was forfeited as a direct result of drug forfeiture actions by the state.

**Human Rights Commission:** The division opened 34 new matters for the commission, including 5 new cases and 21 case reviews.

**Department of Health:** The division attorneys opened approximately 564 matters on behalf of the department's boards and commissions including advice (279) and litigation (285). The complexity and length of time it takes to try cases continues to increase dramatically as parties engage in more active pre-hearing discovery and litigation than in past years.

**Department of Financial Institutions:** In 2004, the number of cases pursued on behalf of the department increased from 9 to 17. These cases were against companies that violated the state financial laws, including securities, banking, credit unions, mortgage lenders and consumer lenders. The division also opened 13 client advice matters for the department. The division handled a lawsuit filed by a securities company to enforce an unexecuted settlement agreement and defended a writ of mandamus that required the department to explain why it had not taken enforcement action in response to particular newspaper advertising by mortgage brokers.

**Horse Racing Commission:** The division handled 33 enforcement matters for the commission this year against trainers, jockeys and other racing participants. Additionally, 39 advice matters were opened. The staff also worked with the commission on new rules required to implement 2004 legislation authorizing account wagering.

**Lottery Commission:** The division has not handled any cases involving challenges to lottery games in 2004.

**In only the second case of its kind ever brought, the commission filed suit against a Port of Anacortes commissioner for violating campaign laws by exceeding the financing limits of mini-reporting.**

## Significant Cases and Their Impact

### Campaign Laws

**Washington Education Association v. Public Disclosure Commission:** This case arose from an enforcement proceeding initiated against the Washington Education Association for its failure to properly comply with the state campaign laws by failing to obtain proper authorization from non-union members prior to using their nonmember fees for political purposes. In 2001, the Thurston County Superior Court awarded a \$400,000 penalty against the WEA for these failures and assessed an additional \$190,000 in attorneys fees and costs. On appeal, the Court of Appeals for Division II, in Washington, determined that the law under which the penalty was assessed (RCW 42.17.760) was unconstitutional and overturned the lower court's determination. The state appealed the case, argument was heard by the court in May 2004, and a decision is pending.

**Public Disclosure Commission v. Pat Mooney:** In only the second case of its kind ever brought, the commission filed suit against a Port of Anacortes commissioner for violating campaign laws by exceeding the financing limits

## Government Compliance & Enforcement Division

- of mini-reporting. As a remedy the commission requested that Mr. Mooney be removed from his position because his violations likely influenced the outcome of this election. Mr. Mooney won by only 21 votes. The case settled prior to trial with Mr. Mooney agreeing to resign from his position as well as accepting a penalty and other limits on future campaign activities.

### ● Insurance Commissioner

- **Premera Blue Cross:** The Premera Blue Cross organization petitioned the Insurance Commissioner for permission to convert from non-profit to for-profit status. A hearing on this application was conducted in May 2004. By order in July 2004, the commissioner rejected the application and Premera filed an appeal of this decision. The matter has been pending in Thurston County Superior Court but based on a request from Premera, the case will be moved to the Court of Appeals, Division II.

- **Western United Life Assurance:** The division represented the Insurance Commissioner in a receivership action filed against this insurance company. The purpose of the receivership is to protect the assets of the insurance company and the policyholders in light of the bankruptcy of its parent mortgage and securities companies. Because investors are involved at the parent level, the division has coordinated with the Spokane Consumer Protection Division in regards to the impact of the bankruptcy actions.

### ● Major Issues/Events

- **Energy Siting Projects:** The Counsel for the Environment (CFE) is appointed by the Attorney General for energy facility applications filed under the jurisdiction of the Energy Facility Site Evaluation Council (EFSEC). The role of the CFE is to represent "the public and its interest in protecting the quality of the environment." Currently, the CFE is involved in several energy facility siting determinations pending before the EFSEC. These proposals include BP's Cherry Point project located near Ferndale in Whatcom County and two wind generation facilities in Kittitas County, namely, Kittitas Valley Wind Power Project and Wildhorse Wind Power Partner Project.

- **World Trade Organization - Internet Gambling Complaint:** The two-island, Caribbean nation-state of Antigua and Barbuda, an independent country that is a member of the British Commonwealth, has filed a legal challenge with the World Trade Organization seeking to invalidate all of the gambling laws (specifically Chapter 9.46 RCW) of the state of Washington, the U.S., and all other U. S. states, territories and possessions. Antigua is home to a number of Internet gambling operations that make a sizeable contribution to that nation's economy and its tax base. Antigua claims that our laws prohibiting, licensing and regulating gambling, and specifically Internet gambling, violate the U.S.' commitments under the GATS (General Agreement on Trade in Services) Treaty by restricting Antigua's "right" to provide internet gambling "services" to Washington residents. Division staff represent the Washington State Gambling Commission and the Washington State Trade Representative and are working with the U.S. Department of State and the Office of the U.S. Trade Representative in defending this

## Government Compliance & Enforcement Division

challenge. A three-judge panel (from India, Thailand, and the UK) has heard the case and a decision finding violations of the treaty by the U.S. and four states (not Washington) has been issued. A decision on an appeal is pending.

# Government Operations Division

**The year 2004 continued to be a busy year for the division. The Department of Retirement Systems had the highest concentration of complex litigation, including significant appellate victories in the last year.**

## ● Summary of Responsibility

- The Government Operations Division handles the litigation for, and provides legal advice to 40 state agencies and elected officials. These include the departments of General Administration, Retirement Systems, Military and Emergency Management, Information Services, and Personnel, the Washington State Senate and House of Representatives, State Treasurer, State Investment Board, Public Employment Relations Commission, State Actuary, Energy Facility Site Evaluation Council, certain divisions and programs of the Office of Secretary of State, and other departments that provide services to government agencies or employees. In addition, the division provides representation to numerous boards and commissions including the Arts Commission, Historical Society, Interagency Commission for Outdoor Recreation and the Commissions on African American, Asian Pacific American, and Hispanic Affairs.

## ● Legal Services Provided

- The division's 16 attorneys and 8 professional staff provide a wide range of legal services to their clients, including defense of multi-million dollar class-action lawsuits, construction litigation, advice on complex real estate transactions, financing and bonding issues, state investments, anti-terrorism efforts, and emergency management. In addition, the members of the division provide client advice and handle litigation on a myriad of other issues such as contracts, computer hardware acquisition, software licensing, the siting of major energy facilities, the purchase of goods and services for government agencies, labor law, employee benefits, state employment, and National Guard matters. Attorneys in this division are actively involved in providing coordination and advice to all AGO divisions on contract law issues, real estate matters, construction claims, public works, prevailing wage and e-commerce issues.

## ● Numbers/Trends

- The year 2004 continued to be a busy year for the division. The Department of Retirement Systems had the highest concentration of complex litigation, including significant appellate victories in the last year. The division's workload changed after the September 11 attacks, and the new workload associated with new Homeland Security and emergency preparedness issues is expected to continue. The volume of work relating to debt financing for the State Finance Committee and the Office of the State Treasurer has continued to be steady due to favorable interest rates and new programs. Similarly, our work with the State Investment Board has become more complex due to heightened scrutiny associated with continuing corporate

## Government Operations Division

scandals, class action litigation, and evolving concerns about investments in terrorist sponsoring nations. In addition, investment work has increased due to improving market conditions. There has also been a significant amount of legal work associated with the permitting of proposed energy facilities (most recently wind power projects).

### Significant Cases and Major Issues

#### Anti-Terrorism

**Military Department and Emergency Management:** Attorneys in the division have coordinated with other members of the AGO to provide uniform advice on disaster planning, National Guard deployment, and the state's response to potential terrorist activity. As nationwide efforts on Homeland Security develop, division attorneys are working on a broad variety of security and preparedness response issues.

#### State Labor Laws and Civil Service Reform

**Department of Personnel and Office of State Procurement:** In 2002, the Legislature enacted the Personnel System Reform Act, which called for sweeping changes to the state's civil service system that will be completed by July 2005. Major aspects of this enterprise are (1) a complete revamping of the merit system and its rules, (2) collective bargaining over wages, hours and benefits as well as working conditions, (3) contracting out of services "traditionally and historically provided by state employees," with the ability for employees to form business units and compete for certain types of contracted work, and (4) replacement of the state's human resources and payroll system to accommodate these changes, now known as the Human Resources Management System. Division attorneys are advising the Departments of Personnel and General Administration on a range of complex issues arising from the contracting out provisions and the enormous changes to the civil service structure, and are coordinating advice that touches on collective bargaining with the Labor and Personnel Division.

#### Retirement

**LEOFF Plan 2 Retirement System Board:** Pursuant to I-790 approved by voters in 2002, a new retirement system board started operations in July 2003. The state has not had a retirement system board for more than 20 years. Division attorneys continue to work with the new board on set up, authority issues, and numerous other legal questions.

**Public Safety Employees Retirement System:** During the 2004 legislative session a new retirement system was created. Division attorneys will be working with the Department of Retirement Systems on a wide variety of issues to implement this new system.

**As nationwide efforts on Homeland Security develop, division attorneys are working on a broad variety of security and preparedness response issues.**





# Labor and Industries Division



## Summary of Responsibility

The Labor and Industries Division represents a single client, the Department of Labor and Industries.

**Industrial Insurance:** A major responsibility of the Department of Labor and Industries (L&I) is the administration of the Worker's Compensation Act. The act is designed to ensure that injured workers are provided comprehensive benefits and services in a cost-effective manner. Under the act, L&I serves as the trustee and administrator of premiums paid by workers and employers into several trust funds which have aggregate assets of approximately \$4 billion. In addition to administering workers' compensation claims, L&I has established a comprehensive Employer Services program for assessing and collecting insurance premiums. L&I also administers programs responsible for prosecuting individuals who fraudulently collect workers' compensation benefits and for prosecuting medical and vocational providers who commit fraud.

A crime victims' compensation program compensates innocent victims of criminal acts. L&I administers the claims and pays benefits to those who qualify.

**Regulatory Functions:** The Washington Industrial Safety and Health Act (WISHA) authorizes L&I to administer a workplace health and safety program. Washington is one of 23 states which, rather than submitting to direct federal regulation in this area, administers a state-run Occupational Safety and Health Plan subject to federal oversight.

L&I's Employment Standards program enforces wage and hour laws, regulates apprenticeship training, and monitors whether companies bidding on public works have complied with prevailing wage laws.

The Specialty Compliance Services division handles a variety of regulatory and enforcement functions including boiler inspections, electrical inspections, regulation of factory assembled housing, elevator inspections and contractor registration.

## Legal Services Provided

L&I receives more than 15,000 claims for industrial insurance benefits each month. Although most of these claims are administered and resolved within L&I, nearly 600 disputed claims per month are handled by Attorney General staff. These industrial insurance appeals constitute nearly two-thirds of the division's workload. Approximately 35 percent of these appeals are resolved by paralegals through a mediation process. Individual attorney caseloads

**These industrial insurance appeals constitute nearly two-thirds of the division's workload. Approximately 35 percent of these appeals are resolved by paralegals through a mediation process.**

## Labor and Industries Division

**The division's current caseload includes more than 60 cases pending in state and federal appellate courts.**

- typically represent several million dollars in exposure to L&I's accident and medical aid funds and present complex medical, vocational and legal issues.
- A single pension case represents an average of \$250,000 in potential liability. Division attorneys also represent the department in regulatory actions and provide program advice. Attorneys practice before the Board of Industrial Insurance Appeals and before the state courts at all levels.

### Numbers/Trends

- The Board of Industrial Insurance Appeals (BIIA) hears all appeals filed by injured workers and by employers. The BIIA granted approximately 7,036 industrial insurance appeals in fiscal year 2004. This represents a decrease of approximately 5 percent from the number of industrial insurance appeals granted in fiscal year 2003. The BIIA granted approximately 353 WISHA appeals in fiscal year 2004. This represents a decrease of approximately 23 percent from the number of WISHA appeals granted in fiscal year 2003. The division's current caseload includes more than 60 cases pending in state and federal appellate courts. Employer services, specialty compliance, fraud and related caseloads are beginning to increase as L&I implements a comprehensive fraud and abuse initiative.

### Significant Cases and Their Impact

- **Washington State Farm Bureau v. Trause, et al.:** The Farm Bureau initiated an action in U.S. District Court alleging that absent the consent of the land owner, all warrantless inspections conducted by L&I staff for the purpose of enforcing the Washington Industrial Safety & Health Act are unconstitutional. The Farm Bureau further alleges that L&I does not have the authority to obtain administrative inspection warrants under Washington law. L&I and intervenors (Washington State Labor Council and three individual farm workers) responded by arguing that the federal action is precluded by the Farm Bureau's lack of standing and by the 11th Amendment of the U.S. Constitution, and by defending the constitutionality of the department's inspection practices. Without reaching the merits, the U.S. District Court granted a motion by the department and intervenors to dismiss the case. This dismissal is currently on appeal to the Ninth Circuit.
- **Gallo v. Department of Labor and Industries:** In *Cockle v. DLI* (2001), the state Supreme Court held that employer contributions for health care benefits provided to workers and their families constitute "wages" that must be considered when calculating workers' compensation benefits. Since this decision, claimants have been seeking to establish through litigation that various other benefits should also be included in the wage computation. The *Gallo* case has been consolidated with four other cases which collectively ask whether employer-provided retirement, training, life insurance, disability insurance and several other benefits should be treated in the same manner as health care benefits under *Cockle*. Argument was heard in November 2004, at the state Supreme Court.
- **Rhodes v. Department of Labor and Industries and Related Cases:** Where a worker has received an award for permanent partial disability

## Labor and Industries Division

(PPD) and later receives a pension, statutes direct L&I to reduce the pension award in a manner designed to recoup the PPD award. There are a number of cases pending in both Superior Court and at the BIJA that question the manner in which L&I effects the reduction.

### Major Issues/Events

**Premium Increases:** For the past several years L&I has announced industrial insurance premium increases, following a number of years without such increases. The increases appear to be largely attributable to stock market reversals affecting L&I administered trust funds, increases in the costs of medical care and court decisions that have tended to expand worker benefits. Nonetheless, the increases have prompted significant debate among stakeholders and in the Legislature regarding remedial measures that might preclude further increases.

**Fraud and Abuse Initiative:** Over the past year, L&I has become significantly more aggressive in pursuing workers, employers, and providers who seek to perpetrate fraud, avoid the payment of industrial insurance taxes, over-bill for services, or otherwise take financial advantage of the workers' compensation system. L&I has reorganized and reassigned staff in furtherance of this initiative, and the initiative has, to some extent, informed L&I's legislative agenda. The initiative is supported by many stakeholders from both business and labor.

**Rios, et al., v. Department of Labor and Industries:** L&I promulgated rules under WISHA designed to protect farm workers from pesticides. In addition, L&I developed a guideline recommending, but not requiring, blood monitoring of workers exposed to pesticides. Plaintiff farm workers appealed L&I's decision not to require blood monitoring. In February 2002, the state Supreme Court ordered L&I to "initiate rulemaking on a mandatory... monitoring program for agricultural pesticide handlers." The rules, newly implemented, are the subject of close scrutiny by both business and labor organizations.

**Emerging Areas of the Law:** Attorneys in the division are working closely with L&I in matters that involve emerging areas of the law. L&I's efforts include assisting the agricultural industry with farm worker safety issues, ensuring minimum wages for minors, reducing long term disability of injured workers, ensuring that injured workers receive fair and competent vocational services, ensuring that workers are properly classified for purposes of industrial insurance coverage, and utilizing complex information systems to speed the delivery of benefits and services to injured workers.

**Over the past year, L&I has become significantly more aggressive in pursuing workers, employers, and providers who seek to perpetrate fraud, avoid the payment of industrial insurance taxes, over-bill for services, or otherwise take financial advantage of the workers' compensation system.**

# Labor and Personnel Division

**The division provides client advice and assistance to its clients on a variety of personnel-related matters, such as the Americans with Disabilities Act, the Family Medical Leave Act, Fair Labor Standards Act, Washington Management Service and Merit System, and labor relations issues.**

## ● Summary of Responsibility

- The Labor and Personnel Division provides centralized employment and personnel-related legal services and expertise to state agencies and higher education institutions. The division currently supports all state agencies with the exception of the University of Washington, which receives its employment related legal services from the University of Washington Division.

## ● Legal Services Provided

- The division represents state agencies and higher education institutions in employee discipline, disability separation, and certain rule violation and reduction-in-force appeals before the Personnel Appeals Boards, and the various Washington State Patrol hearing boards. The division also represents agencies in unfair labor practice complaints and grievance arbitrations before the Public Employment Relations Commission, the Personnel Resources Board and the Marine Employees Commission as well as agencies in appeals of these administrative decisions to superior courts.
- The division provides client advice and assistance to its clients on a variety of personnel-related matters, such as the Americans with Disabilities Act, the Family Medical Leave Act, Fair Labor Standards Act, Washington Management Service and Merit System, and labor relations issues. It also handles wage-related cases in state and federal courts.
- Over the past year, the division has conducted training for state agencies on a variety of topics, including employee misconduct investigations, the Public Records Act, processing discovery, the Family Medical Leave Act, workplace violence, labor relations and reasonable accommodation. The division continues to sponsor monthly personnel manager meetings for state agency personnel staff to discuss case law updates as well as special employment-related issues. The division also sponsors bi-monthly personnel manager meetings in Eastern Washington. Finally, the division completed and issued an Employment Law Deskbook on a variety of employment related topics.

## ● Numbers/Trends

- **Caseload:** The division currently has an active caseload of approximately 428 cases. Of those, 273 are active cases before the Personnel Appeals Board on employee appeals of agency disciplinary actions, alleged violations of merit system rules by state agencies, separation of employees based on the inability to perform essential job functions, and layoffs. In addition, the division has approximately 1,204 active client advice files related to issues, subjects and situations upon which the division is called to give advice.

## Labor and Personnel Division

**Labor Matters:** The amount of labor related work by the division continued to increase as the state transitioned towards implementation of full scope collective bargaining. The bulk of these matters related to the formation of bargaining units or the perfection of bargaining units in advance of bargaining. The division currently has 61 active labor related cases--48 of which involve grievance arbitrations or unfair labor practices before the Marine Employees Commission involving the State Ferry system.

**Tort Issues:** While the division no longer litigates employment related tort cases, it does provide proactive client advice on issues carrying tort implication and, where appropriate, engages in early dispute resolution. The division works closely with the Torts Division's Employment Team to provide a continuum of employment related advice and representation.

**Appeals:** This past year, the division continued to experience an increase in the number of administrative cases being pursued through the state courts. In fiscal year 2004, the division had 27 judicial reviews in state Superior Court. During the same time frame, the division had seven cases go to the Court of Appeals or Supreme Court. The division also had its first two state Supreme Court arguments in May and October of 2004.

**Wage Matters:** The division continues to see an increase in wage cases brought under the state Minimum Wage Act and the Industrial Welfare Act. The division currently has 29 active wage cases.

**Miscellaneous:** The division handles other miscellaneous cases, which include Human Rights Commission complaints, contracting out and public disclosure claims.

**This last year, the division prevailed in the Court of Appeals on two class action wage cases involving disputes about setting of salary levels.**

## Major Issues/Events

**Wage Cases:** The division continues to see an increase in wage cases brought under the state Minimum Wage Act or the Industrial Welfare Act. The claims stem from missed breaks and meal periods, unpaid pre- and post-shift activities or claims based upon the state civil service system. Four of the cases are class action cases. This last year, the division prevailed in the Court of Appeals on two class action wage cases involving disputes about setting of salary levels. Additionally, the division prevailed in the Court of Appeals upholding a ruling that attorney fees are not recoverable under the wage recovery statute in Personnel Appeals Board cases. Additionally, the division settled two class action claims for uncompensated pre- and post-shift activities.

**Civil Service Reform:** Under the Personnel System Reform Act of 2002 (PSRA), the state is completely overhauling the state civil service system. These changes along with collective bargaining and contracting out completely revamp the landscape of employer-employee relations in state government. The division continues to advise state agencies and higher education institutions as the changes to the system come into place.

**Collective Bargaining:** Under the PSRA, the scope and scale of collective bargaining for state employees has changed. State employees now have the

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# Licensing and Administrative Law Division



## Summary of Responsibility

The Licensing and Administrative Law Division was formed by the Attorney General along with two other new divisions in July 2001 to better align clients with similar interests and functions. The division provides full legal services to three state agencies: the Departments of Licensing, Employment Security, and the Board of Accountancy. It also provides legal advisors for a number of the state's boards and commissions, including the Public Disclosure Commission, Liquor Control Board, Salmon Recovery Funding Board, Columbia River Gorge Commission, Growth Planning Boards, Environmental Hearings Office, Executive Ethics Board, Legislative Ethics Board, and State 7E7 Project Office.

The division handled more than 2,500 cases this last year in a variety of administrative, state, and federal forums, with more than half coming to closure. The division has expertise in the areas of administrative and appellate procedure, public records and open public meeting issues, and professional, driver and vehicle licensing issues.

**The division handled more than 2,500 cases this last year in a variety of administrative, state, and federal forums, with more than half coming to closure.**

## Legal Services Provided

The division's attorneys and professional staff provide legal services that include advice and counseling on rule-making, contracts, policy writing and proposed legislation, as well as representation in actions filed against client agencies, their employees and officers. In addition, attorneys represent the state in regulatory prosecutions before administrative tribunals, appeals to Superior Court of administrative hearing decisions, and in other actions against the state in the federal courts or the Washington State courts of appeal and Supreme Court.

The different kinds of steady litigation handled by the division include:

- **State Board of Accountancy:** Professional licensing disciplinary cases initiated by the board against accountants who violate the licensing law through misconduct.
- **Employment Security Department:** Appeals in Washington State courts seeking review of claims in which unemployment benefits were denied to claimants or the granting of benefits to a claimant, appealed by an employer.

Cases, usually at the appeal level, which seek payment of unemployment insurance taxes from employers, who either claim to be exempt from payment of the tax, challenge the change in status as a covered employer or claim that their tax liability should be less.



## Licensing and Administrative Law Division

- **Department of Licensing:** Appeals in Superior Court where drivers challenge their breath test results or their refusal to take breath tests when suspected of drinking and driving.
- License suspension appeals in Superior Court for uninsured drivers involved in vehicle accidents where there is personal injury or property damage.
- Matters in Superior Court or in higher courts to defend challenges to driver license laws or agency decisions against drivers for other violations of the driver license law, like driver improvement or commercial driver license suspensions.
- Regulatory misconduct matters brought before administrative law judges against professional licensees, such as real estate licensees and vehicle dealers, and tax assessment matters against motor vehicle fuel distributors.

### Major Issues/Events

#### Department of Licensing - Driver Services Division

- **City of Redmond v. Moore:** The Supreme Court ruled in June the law for mandatory driver license suspensions for "failure to appear" (FTA) (pay an infraction fee) is unconstitutional because the law does not require a hearing opportunity before the suspension goes into effect. DOL issues approximately 300,000 suspensions of this kind each year. It is likely a bill with a streamlined hearing process will be proposed in the 2005 legislative session. Until a new law is passed, DOL will continue to record FTAs on driver records but it will not suspend driver licenses.

#### Department of Licensing - Vehicle Services Division - Title and Registration Program

- **I-776 Litigation:** In 2002, following statewide passage of this vehicle fee rollback initiative, King and Pierce counties challenged the constitutionality of I-776, which involved the collection of local option and gross weight excise fees in King County Superior Court. The complaint alleged the initiative was unconstitutional on six grounds: no single subject, no subject in title, inadequate disclosure of laws amended, infringement of citizens' right to self government, impairment of contracts, and equal protection violations. The Supreme Court upheld I-776, finding it did not violate the state constitution. The case was remanded in May 2004 to Superior Court to resolve outstanding issues. In July 2004, the court entered an order dealing with the refunds of the county's local option fees and the state's gross vehicle weight fees. The court heard dispositive motions on the remaining issues in October 2004 and ruled that Sound Transit's bond contracts would be constitutionally impaired if it could not collect the MVET tax through the bond retirement dates. Therefore, DOL will continue to collect the MVET tax for Sound Transit. This case may be appealed.

## Licensing and Administrative Law Division

### Department of Licensing - Pro Rate and Fuel Tax Program

**Teo v. Steffenson:** The Yakama Indian Nation filed a petition in federal court to enforce the terms of the consent decree entered in this case in 1994 that allows the nation to purchase 70 percent of the fuel imported to the reservation without the state fuel tax, and requires annual audits and adjustment of the percentages of exempt fuel. The tribe has not consistently complied with the terms of the decree since its inception, yet the nation is demanding additional payments from the state. The petition requests referral of the case for mediation. If mediation fails, the case will likely be resolved on cross-motions for summary judgment. No trial date or other case schedule has been set.

### Liquor Control Board

**Costco vs. LCB et al.:** Costco filed an antitrust lawsuit in U.S. District Court in February 2004, stating that the laws the LCB enforces relating to beer and wine, in particular, its price posting system for liquor (the 10 percent minimum markup requirement for distributors and the ban on quantity discounts) violates antitrust laws and that the LCB is not exempted from antitrust prohibitions. The LCB filed a motion to dismiss this case on the pleadings; oral argument was heard in September 2004. Trial is set for September 2005.

### Public Disclosure Commission

**Edelman v. PDC:** The Supreme Court took this case after the division petitioned the court following a decision by the Court of Appeals Division II finding the PDC rule, WAC 390-16-311, invalid because it is inconsistent with the statute, RCW 42.17.660. The rule addresses the contribution limits for large organizational contributors under RCW 42.17.640 and RCW 42.17.660, which are two statutes passed as the result of Initiative 134. The Supreme Court issued its decision and invalidated the PDC rule holding that local sub-units of an organization share the contribution limit with other levels (state and national) of the organization. The rule had been in effect for approximately 10 years and was implemented following Initiative 134. Following the decision the PDC repealed the rule.

### 7E7 Project Office - Public Records

**EFF v. CTED:** The Evergreen Freedom Foundation (EFF) filed a motion to show cause regarding EFF's public records request of Community Trade and Economic Development (CTED) for 7E7 project records. The court ruled that the documents were properly disclosed. The judge also ruled that EFF could not continue to inundate CTED with multiple and staggered requests for public records. The court directed a procedure for future public records request. EFF appealed this ruling to the Court of Appeals where the case is pending for oral argument.

# Regional Services Division

**Regional Services attorneys generally carry a mixed caseload, with a heavy emphasis on high-volume litigation in Superior Court and before administrative tribunals.**

## ● Summary of Responsibility

- The Regional Services Division consists of seven offices that are the “face of the AGO” in Bellingham, Everett, Port Angeles, Vancouver, Kennewick, Yakima, and Wenatchee. These offices provide a wide variety of legal services for a number of different client agencies, such as the Department of Social and Health Services, Department of Labor and Industries, Employment Security Department and Department of Licensing. The offices also represent educational institutions, including Western Washington University and Central Washington University, as well as local community and technical colleges: Peninsula, Whatcom, Bellingham Technical, Skagit Valley, Everett, Edmonds, Clark, Lower Columbia, Walla Walla, Columbia Basin, Yakima Valley and Wenatchee Valley. The Regional Services Division also represents and advises the School for the Deaf, the School for the Blind, and several Educational Service Districts.
- The Regional Services offices range in size from 5 employees in the Port Angeles Office to 25 employees in the Everett Office. Each of the Bellingham, Vancouver and Kennewick offices has a Consumer Resource Center. Several offices are home to Torts employees. In total, there are approximately 100 attorneys and professional staff employees who work out of the Regional Services Offices.

## ● Legal Services Provided

- Regional Services attorneys generally carry a mixed caseload, with a heavy emphasis on high-volume litigation in Superior Court and before administrative tribunals. Some attorneys also have client advice responsibilities, particularly with higher education clients.
- Most of the work of the division involves juvenile litigation, which is done on behalf of the Children’s Services Administration of the Department of Social and Health Services. Attorneys file dependency cases when a child has been abused or neglected. They also handle cases involving the termination of parental rights when a child has been out of the home and the parents are unable to care for the child. At times, attorneys also handle licensing actions relating to foster homes and daycare facilities, as well as licensing actions involving adult family homes and boarding homes for the Aging and Adult Services Administration of DSHS.
- The next largest percentage of work is done on behalf of the Department of Labor and Industries, which administers the state’s workers’ compensation program. Attorneys defend L&I orders before the Board of Industrial Insurance Appeals that are appealed by injured workers who are seeking benefits or additional benefits. To a lesser degree, they also defend

## Regional Services Division

L&I orders that assert worker fraud, as well as orders that are appealed by employers who challenge the amount assessed for their workers' compensation premiums.

Attorneys also represent the Employment Security Department and the Department of Licensing in litigation. Attorneys handle appeals to Superior Court that seek review of claims in which unemployment benefits were denied to claimants or granted to claimants and the matter is appealed by an employer. Attorneys also handle appeals in Superior Court where drivers, whose licenses have been suspended, challenge their breath test results or their refusal to take breath tests when suspected of drinking and driving.

Regional Services attorneys also handle education work, which is extremely diverse. Division attorneys advise on matters as varied as constitutional rights, labor/management disputes, employee rights, student rights and responsibilities, discrimination and sexual harassment, public contracting, intellectual property, and general public sector business issues.

**The Kennewick Office has worked with local officials over the past year to implement the Benton-Franklin County Drug Court.**

### Numbers/Trends

In 1988, the division had 21 attorneys in 5 offices. Due to an increase in workload, the division added two offices, Wenatchee and Port Angeles, and more than doubled the number of attorneys and professional staff members. The numbers and trends for divisional work often mirror those of the divisions with whom Regional Services attorneys must coordinate. However, population growth in certain counties and changes in a client's regional administration of its services can result in a significant increase in just one office's caseload.

### Significant Cases and Their Impact/ Major Issues/Events

**Contempt Appeals:** In re: Yolanda H.; In re: April K; In re: Maria O. (two orders on appeal) - four pending appeals have been filed in Division III involving teenage dependent children who were found in contempt of court, under the court's inherent civil powers rather than the limited contempt provisions which limit a child's time in detention. A ruling that affirms the lower court would significantly expand a court's authority to impose sanctions on children who are dependent, perhaps imposing detention up to the child's 18th birthday. Such sanctions have previously been limited by statute and case law to seven days. These appeals are being handled by the Yakima office.

**Dependency Drug Court:** The Bellingham Office and the Kennewick Office are actively involved in implementing Dependency Drug Courts in Whatcom County and in Benton and Franklin Counties. The Bellingham Office has been involved with the Whatcom County Drug Court since 2001. The Kennewick Office has worked with local officials over the past year to implement the Benton-Franklin County Drug Court. Recently, the Vancouver office was approached by Cowlitz and Clark counties about providing assistance with

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# Social and Health Services Division



## Summary of Responsibility

The Department of Social and Health Services (DSHS) administers a variety of federally and state-funded programs to protect the general public and assist those who are unable to provide for themselves. Programs include income and medical assistance, children's services, child support, mental health services, developmental disabilities, juvenile rehabilitation, alcohol and drug rehabilitation, vocational rehabilitation, nursing home surveys, adult protective services, home and community care services, and other related community social service program activities.

Five divisions of the Attorney General's Office provide legal services to DSHS in addition to the specialized services of the Torts Division and Labor and Personnel Division. Over the past year, between 125 and 130 attorneys have worked on DSHS issues in any given month. The majority of legal support to DSHS falls into two main areas: children's services litigation and advice and representation for DSHS headquarters in Olympia. Currently, 72 percent of the legal services support juvenile dependency and parental rights termination cases, as well as the other child welfare services programs. The remaining 28 percent is legal support for all other DSHS programs.

In addition to representing DSHS, the Social and Health Services Division also provides legal support to the Department of Veterans Affairs and the Department of Services for the Blind.

**Currently, 72 percent of the legal services support juvenile dependency and parental rights termination cases, as well as the other child welfare services programs.**

## Legal Services Provided

### Major DSHS Program Areas

**Children's Services:** The majority of legal services are in litigation-related activities, including initiating dependency cases in which a child has been abused or neglected; filing for termination of parental rights when a child has been out of the home and the parents are unable to care for the child; and licensing actions relating to foster homes, group care, daycare facilities, and child-placing agencies. Client advice, for both DSHS headquarters and regional offices, is provided to the Children's Administration, which administers child protection and welfare programs.

**Economic Services:** The Economic Services Administration (ESA) administers public assistance programs, including Temporary Assistance to Needy Families (TANF), food stamps, general assistance, Supplemental Security Income (SSI), telephone assistance, and refugee assistance. Litigation ranges from individual appeals of reductions to or denials of benefits to class action lawsuits challenging program implementation. Other significant issues include the development of agreements with Indian

## Social and Health Services Division

- tribes for the delivery of TANF and Workfirst services on the reservations, confidentiality of client records, electronic application for and delivery of public assistance benefits, ongoing advice on proposed and enacted legislation, and administrative regulations on both the state and federal levels. ESA also administers the child support program. Legal services provided to the Division of Child Support (DCS) include both legal advice and litigation support. Litigation primarily involves class action lawsuits challenging administration of the program and representation of DCS in appeals to Superior Court under the Administrative Procedure Act and in bankruptcy court. Prosecutors generally handle litigation relating to individual child support orders.
- **Medical Assistance:** The Medical Assistance Administration (MAA) is responsible for administering federal and state programs that provide medical services to indigent residents. Legal services to MAA include client advice and representation before federal and state tribunals on issues concerning:
  - compliance with the federal Medicaid laws; payment rates paid to hospitals and other medical providers; medical services provided; contract disputes with medical providers, including contractual agreements with managed care plans and providers in the Healthy Options program; and Medicaid eligibility issues.
- **Aging Services:** The DSHS Aging and Disability Services Administration administers a wide variety of programs that provide services to elderly and vulnerable adults in the state. Those programs include residential care services (nursing homes, adult family homes, boarding homes, and the resident protection program); home and community services (Medicaid personal care, COPES, Chore, and adult protective services); developmental disabilities services (as further described below); and management services. Attorneys provide legal advice on the interpretation of state and federal (Medicaid) laws that govern DSHS programs. They also represent the agency in litigation, including, but not limited to, provider licensing actions, provider contract termination actions, and challenges to Medicaid rates paid to providers.
- **Developmental Disabilities:** This DSHS Division operates five residential habilitation centers for the developmentally disabled and contracts with counties and private providers for home and community-based residential and day programs. Legal services involve ongoing advice to division staff on various issues including eligibility for services, federal reimbursement, program certification, contracts, civil rights and right to treatment issues, public disclosure, and adoption of administrative rules and policies. Litigation issues include eligibility and access to services, access to clients and client records by the Washington Protection and Advocacy System, standards of care in institutions and state mental hospitals, right to community placement under the Olmstead decision interpreting the Americans with Disabilities Act (ADA), and medical decision making.
- **Mental Health:** The DSHS Mental Health Division operates the two state mental hospitals and the Child Study and Treatment Center. It also contracts with Regional Support Networks to provide Medicaid and state-funded community mental health services. Legal advice is provided to the state



## Social and Health Services Division

hospitals on a wide variety of issues ranging from patient health care and confidentiality, to contracts for educational services for minor patients at the children's facility, to questions concerning the forensic services unit. Legal advice and representation are provided in all civil commitment hearings and jury trials at Western State Hospital and Eastern State Hospital. Attorneys represent the state hospitals in civil rights litigation concerning patients' rights to various types of treatment and services. Advice to the Mental Health Division covers such issues as Medicaid and Medicare financing, licensing, and contracts with the Regional Support Networks. Attorneys also represent the Mental Health Division in litigation concerning disbursement of Medicaid funds and reimbursement of community mental health providers.

**Special Commitment Center:** The Special Commitment Center (SCC) houses the DSHS program for the involuntary treatment of sexually violent predators. Litigation has involved complex civil rights challenges by program residents against all aspects of the program and, more recently, challenges by communities objecting to the potential siting of a secure community transition facility for residents determined by a court to be ready for placement in a less restrictive alternative to the McNeil Island SCC facility. The office also defends individual SCC and DSHS employees in civil rights or torts actions brought in federal court by residents of the SCC.

**Juvenile Rehabilitation:** The Juvenile Rehabilitation Administration (JRA) provides for the care, custody, rehabilitation, and community supervision of court-committed juvenile offenders. JRA operates six institutions, one basic training camp, and seven state-operated group homes. It also contracts out for additional community residential placements. Legal services to JRA include program advice on a variety of issues, such as terms and conditions of confinement, right to treatment, conditions of parole, public disclosure, and community protection requirements.

**Office of Deaf and Hard of Hearing Services:** This division of DSHS provides telecommunications access to individuals who are hearing or speech impaired. It provides telecommunications equipment to eligible persons and contracts out for a telecommunications relay service that provides telephone access to the hearing-impaired. The Office of Deaf and Hard of Hearing Services also contracts out with regional providers for access programs and advocacy services for hearing impaired persons. The division's primary legal service is to provide client advice on issues such as eligibility, contract formulation and administration, and interpretation of statutes and regulations.

**Office of Financial Recovery:** The Office of Financial Recovery (OFR) is responsible for collecting money that is owed to various DSHS programs such as the Medicaid Drug Rebate Program, Medical Assistance Administration's Long-term Care Services, Western and Eastern State Hospitals, and Working Child Care Connections. Legal services to OFR include client advice and representation before federal and state tribunals on issues concerning judicial review of administrative decisions, enforcement of creditor's claims in and out of probate, termination of special needs trusts, other types of enforcement actions, and foreclosures.

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**Approximately 8,700 were dependency actions seeking court-ordered protection, placement, or supervision of children alleged or found to have been abused, neglected, or seriously endangered by their parents.**

- **Child Welfare Litigation:** In 2004, AAGs represented DSHS in approximately 9,700 child welfare cases pending in juvenile courts around the state. Approximately 8,700 were dependency actions seeking court-ordered protection, placement, or supervision of children alleged or found to have been abused, neglected, or seriously endangered by their parents. When it is not possible to reunite children with their parents, legal action is initiated to permanently place children elsewhere. The number of termination actions has increased somewhat over the past three years, and the actions focus more on moving children out of the foster care system and into permanent homes as early as possible. It is unclear what effect, if any, the changes to the child welfare system proposed by DSHS will have on the volume and complexity of this caseload.

- **Appellate Litigation:** In 2004, there were approximately 210 appellate cases pending in state and federal courts. The vast majority of these cases are challenges to lower court decisions in child welfare cases, primarily terminations, and generally the appeals relate to the specifics of the particular cases. However, included in this number are several cases involving significant legal challenges to DSHS programs. The major cases are discussed below.

- **Programmatic Challenges:** In recent years, there has been an increase in court challenges to DSHS programs and services. The litigation, generally brought in federal court, is very staff intensive and time consuming. It can result in the judicial system having a greater role in policy making and in potentially significant awards of attorneys' fees against the department. The major cases are discussed below.

### ● Other Client Agencies

- **Department of Veterans Affairs:** The Department of Veterans Affairs (DVA) provides residential, financial, and advocacy services to qualified veterans who are state residents and to veterans' families and survivors. Residential services are offered in three veterans' homes serving approximately 650 residents in Medicaid-funded nursing home settings. The state veterans' homes provide 24-hour nursing and assisted living services in addition to medical and pharmacy services to residents. DVA also offers financial services to veterans by acting as protective payee or fiduciary over income and benefits. DVA staff provide advocacy services to assist veterans in accessing needed state and federal veterans programs. Legal services provided to DVA involve primarily client advice. Recurring topics include eligibility for services, rights of veterans, veterans' home policies and regulations, nature and scope of DVA's fiduciary authority, and federal Medicaid requirements for nursing facilities.

- **Department of Services for the Blind:** The Department of Services for the Blind provides a range of services to visually impaired individuals to assist them in establishing or maintaining their productivity, employability and independence. Legal services for this agency consist primarily of client advice on such issues as eligibility for services, interpretation of applicable statutes and regulations, and various other matters.

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### Number/Trends

**Child Welfare Litigation:** No single child welfare case by itself may have statewide significance, but, cumulatively, decisions in these cases have a profound impact upon affected children and their families, as well as the community at large. The issues and challenges include determining what is best for children who are abused or neglected by parents who are not currently capable of meeting their child's needs; whether the child should be returned home; how frequent visitation should be, if at all; what services the parents should be required to undertake; and finally, whether some parents should have their parental rights severed because they have been unable to correct underlying problems. A tremendous volume of these cases are presented to the courts each year - approximately 4,000 per year -- the vast majority of them handled by AAGs.

**A tremendous volume of these cases are presented to the courts each year - approximately 4,000 per year -- the vast majority of them handled by AAGs.**

### Significant Cases and Their Impact

**Pierce County v. DSHS:** This action seeks damages and injunctive relief and alleges state constitutional and contractual violations related to the contract for community mental health services. The plaintiffs include Pierce County, the Pierce County Regional Support Network (PCRSN), Puget Sound Behavioral Health, Multicare Health Systems, and Washington Protection & Advocacy System. The substance of the claim is that the PCRSN is entitled by statute and/or constitutional right to more beds at Western State Hospital (WSH) than are currently allocated to it by DSHS and is entitled to more money to run its community health system; that, by not admitting long-term patients immediately following commitment, WSH is violating a statutory or contractual obligation; that inadequate discharge planning at Western State Hospital results in discharge of Pierce County residents into the community with inadequate mental health services in violation of their substantive due process rights; and that the state has violated Art. XIII of the state constitution, which states that various state institutions, including those for the mentally ill, shall be fostered and supported by the state. The case is scheduled for trial in May 2005, with any mediation likely to occur in January 2005. The fiscal impact in terms of program costs to DSHS, should plaintiffs prevail, is estimated to be at least \$5 million per year, approximately half of which is attributable to the opening and operation of an additional ward at Western State Hospital.

**Keffeler v. DSHS:** This is a class action brought by foster children receiving financial benefits under Titles II and XVI of the Social Security Act. The Okanogan County Superior Court ruled that DSHS's use of foster children's Social Security benefits to help pay for their foster care violated the Social Security Act, even though this practice is approved by the Social Security Administration and followed in every other state. This ruling was upheld by the Washington Supreme Court but reversed by the U.S. Supreme Court. On remand, the Washington Supreme Court agreed to consider plaintiffs' claim that the Washington program violated procedural due process and equal protection, issues that it had not addressed in its first ruling. It heard oral argument in October 2003, and in April 2004, rejected those claims as well. An adverse ruling could have cost DSHS several million dollars

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- annually as well as potentially many more millions of dollars in refunds. Additionally, if the trial court's ruling had been affirmed, it is likely that the foster children who are otherwise eligible for these payments would not receive them because, in most cases, if DSHS did not apply for the benefits on behalf of the children, there is no one else to do so. The matter is now back in Okanogan County Superior Court where plaintiffs' attorneys have indicated that they will be seeking an order requiring the state to pay their attorneys' fees.

- **Capital Medical Center v. DSHS:** This case involves a program challenge by hospitals that provided care to individuals eligible for services from DSHS's Medically Indigent (MI) medical care program. Prior to termination of the program on June 30, 2003, it covered individuals who were not Medicaid eligible and who incurred emergency medical care. Prior to receiving coverage for covered emergency care, the individual was required to incur \$2,000 in emergency medical expenses in a twelve-month period. Throughout the program, DSHS consistently treated this as an eligibility requirement and a deductible which it did not pay. Plaintiffs dispute that the amount was a deductible and allege that DSHS improperly offset \$2,000 from the MI payments made to the hospitals. Plaintiffs are claiming significant financial damages. The trial is scheduled for May 2005.

- **Braam v. State:** This lawsuit was brought initially as a tort claim but was ultimately converted to a class action on behalf of children currently or previously placed in foster care by DSHS, alleging that their treatment while in the department's custody failed to meet constitutional minimums. Following several weeks of trial, the Whatcom County Superior Court judge ordered substantial revisions to the state's foster care system. In December 2003, the Washington Supreme Court unanimously reversed the trial court, vacated the injunction, and remanded the case for a new trial. Following several weeks of mediation, the parties reached a settlement which incorporates DSHS's Kids Come First II improvement plan, for which the department had already developed a budget proposal for the Legislature. DSHS also agreed to add some elements to its plan to address specific concerns of the plaintiffs. The settlement will be overseen by an expert panel that will establish benchmarks for performance and the professional standards by which compliance will be determined. If the department fails to comply with one of the elements of the settlement agreement, and the parties are unable to mediate a satisfactory resolution, the plaintiffs can seek court enforcement. However, if the reason for non-compliance is lack of resources, the plaintiffs will have to prove that the failure to comply resulted in a violation of the constitutional rights of the class of foster children.

- **Turay v. Weston:** This civil rights action challenges the conditions of confinement at the Special Commitment Center (SCC) for sexually violent predators. All claims except one were eventually resolved in favor of the SCC in 1994. On one claim, the jury found the treatment program was constitutionally inadequate. The federal court appointed a special master who submitted 19 reports evaluating the progress that SCC made toward improving its treatment program. In November 1999, the court found DSHS in contempt for failure to make program improvements quick enough. In June 2004, the court lifted the contempt sanctions, finding that they were no

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longer necessary to compel compliance with the injunction, and dissolved the injunction except for the remaining issue involving the establishment of an off-island community transition program for residents who are successfully progressing in sex offender treatment. The last injunction hearing was held in October 2004. Plaintiffs are trying to reopen the injunction, arguing that SCC's oversight mechanisms are inadequate to prevent backsliding.

**Allen v. Western State Hospital:** This civil rights action challenges the quality of services for developmentally disabled patients at Western State Hospital. This lawsuit followed a finding by the federal government through the Health Care Financing Administration (now Center for Medicare and Medicaid Services) that there were deficiencies in the services provided to developmentally disabled patients. The parties have agreed to a stay of this lawsuit to allow DSHS to implement a three-phase plan to improve services for developmentally disabled hospital patients. A monitoring committee, whose membership was agreed upon by the parties, has been given full access to the programs. Committee members have been positive about many of the changes made at WSH, but a few areas continue to raise concerns. The settlement agreement provided that this case will remain stayed until DSHS completes its plan or plaintiffs become dissatisfied with DSHS's implementation of the plan. However, earlier in 2003 a lawsuit was filed on behalf of 13 Allen class members raising similar claims. That lawsuit was likewise stayed when the department implemented a negotiated discharge policy regarding DDD patients at WSH who are ready to be transitioned to the community.

**Ebert v. DSHS:** This class action in federal court challenged the department's implementation of legislatively mandated changes to the state's supplemental payments (SSPs) to aged, blind and disabled persons who receive federal Supplemental Security Income (SSI) from the Social Security Administration. The Social Security Act requires that the department maintain at least the total level of SSP payment as in prior years, a requirement that had been satisfied prior to July 2002 by providing relatively small SSPs to more than 100,000 SSI recipients. The 2002 supplemental budget directed the department to redirect those payments to specifically targeted populations, primarily those with developmental disabilities. The plaintiff in this case asked the U.S. District Court to declare the department's program in violation of both the Social Security Act and the state Administrative Procedure Act. In October 2003, the court granted the department's motion for summary judgment on the Social Security Act claim and declined to rule on the state law claim. A contrary ruling could have put the department at risk of having to pay as much as \$20 million in additional benefits. The plaintiffs have appealed to the Ninth Circuit Court of Appeals, which is expected to hear oral argument and issue a decision in 2005.

**Parsons et al. v. DSHS:** This case was filed in December 2003, challenging the department's implementation of legislatively directed downsizing of Fircrest School, a residential habilitation center (RHC) for adults with developmental disabilities. Plaintiffs are three residents (represented by their legal guardians) and the Washington Federation of State Employees (WFSE). The residents allege that the downsizing direction, contained in the budget bill for the 2003-2005 Biennium and accompanying budget

**A contrary ruling could have put the department at risk of having to pay as much as \$20 million in additional benefits.**



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- notes, improperly amended substantive law in violation of the Washington Constitution; that DSHS acted improperly in involuntarily transferring residents from one RHC to another; that the state has failed to “foster and support” institutions for the developmentally disabled contrary to Article XIII of the state Constitution; and that transferring patients impaired the collective bargaining agreement between WFSE and DSHS, contrary to Article I, Section 23 of the Constitution. In early March 2004, plaintiffs’ motion for partial summary judgment was denied, and the Washington Supreme Court declined discretionary review in October 2004. Defendants will be filing a summary judgment motion to be heard in December 2004 or January 2005. If that motion is not granted in full, trial is scheduled for May 2005, by which time the downsizing should be complete.

- Arc of Washington v. Quasim:** This lawsuit, brought as a class action, alleges that DSHS is violating federal Medicaid law, the ADA, and the equal protection and due process clauses of the United States Constitution in its management of Medicaid-funded services for clients with developmental disabilities. Plaintiffs claim that DSHS must offer a choice of institutional or community-based residential services to all clients who are eligible for such services under Medicaid. DSHS currently operates those programs within available funds appropriated by the Legislature. Plaintiffs claim that the services are legal entitlements that must be provided to all eligible individuals. The district court ruled that no entitlement exists to Medicaid-funded services provided by Division of Developmental Disabilities (DDD) through the Home and Community-based Services waiver, and that the ADA did not prohibit the state from limiting the number of clients receiving services through the waiver. The parties negotiated a proposed settlement providing for dismissal contingent on agreed-upon increases in legislative appropriations for DDD services in fiscal year 2003 and during the 2004-2005 Biennium. In December 2003, the court rejected the parties’ proposed settlement, ruling that the proposed subclasses had conflicting interests and inadequate representation and that the settlement failed to ensure relief to all class members. The court decertified the class and a few months later granted the department’s motion to dismiss, a decision which was appealed to the Ninth Circuit Court of Appeals. At oral argument in October 2004, the Ninth Circuit panel recommended that the parties consider mediation to resolve the cases. The parties have agreed upon a mediator, and discussions have been scheduled for December 2004.

- Boyle v. Braddock:** This class action was filed by Columbia Legal Services (CLS) in U.S. District Court in Tacoma. The complaint identifies four Division of Developmental Disabilities clients receiving services through its Community Alternatives Program waiver, which receives matching funds through Medicaid and must meet certain Medicaid requirements. Columbia Legal Services alleges that DDD does not inform clients on the waiver, whose numbers approximate 11,000, about services available to them and how to obtain those services, and does not provide mandated services with reasonable promptness. The complaint also alleges that DDD does not provide adequate notice and hearing rights to clients on the waiver. CLS seeks class certification and injunctive relief regarding their claims. In January 2002, the court granted the state’s motion to stay the case pending the court’s consideration of the proposed settlement agreement in Arc v.

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Quasim. In December 2002, the court rejected the proposed settlement in Arc and, as a result, lifted the stay in Boyle. In February 2003, the trial court denied the plaintiffs' motion to have the case proceed as a class action. As with the Arc case above, the court also granted the department's motion to dismiss and that decision has also been appealed to the Ninth Circuit. The case was consolidated with the Arc case for purposes of oral argument. In October, the Ninth Circuit panel recommended that the parties consider mediation to resolve the cases. The parties have agreed upon a mediator and discussions have been scheduled for December 2004.

**Rust v. Western State Hospital:** This class action lawsuit involved claims of unconstitutional conditions of confinement for patients detained in the hospital's Center for Forensic Services. Plaintiffs alleged numerous instances of patient-to-patient assaults due to a failure to adequately staff the Center for Forensic Services. In addition, there were allegations related to the building that housed the Center for Forensic Services, which was condemned following the February 2001 earthquake. This lawsuit was settled with DSHS agreeing to hire additional staff sufficient to insure that patients receive active mental health treatment and supervision. The court monitors recently decided that the defendants' progress in these areas alleviate the need for further outside monitoring. A three and one-half year period of self-monitoring has commenced.

**Marr v. Eastern State Hospital:** Like the Allen case discussed above, this lawsuit, brought by the Washington Protection and Advocacy System, challenges the statutory and constitutional adequacy of services for developmentally disabled patients, but it focuses on Eastern State Hospital. The substantive issues in the case have been settled by the parties. The settlement requires monitoring by a two-person committee selected by the parties for a period of three years. It also explicitly extends the terms of the Allen settlement to class members residing in Eastern Washington.

## Major Events/Issues

**Department of Justice Investigation of Rainier School and Frances Haddon Morgan Center (FHMC):** In May 1998, the U. S. Department of Justice (DOJ) initiated two new investigations of state institutions for the developmentally disabled under the federal Civil Rights of Institutionalized Persons Act (CRIPA) to determine whether program deficiencies exist that violate residents' civil rights under the constitution and the ADA. In order to avoid a prolonged investigation (like that at Fircrest School from 1991-98), an agreement for an expedited process was negotiated. In January 1999, DOJ issued findings alleging civil rights violations at both institutions, primarily relating to the provision of medical and psychological services. DSHS challenged those findings while agreeing to pursue program improvements to address significant concerns of DOJ. The parties have agreed on a third party expert who has already evaluated the services at FHMC and is preparing a draft report that should be completed by early 2005. He will then evaluate the Rainier School. If he determines the facilities meet minimum standards, the CRIPA actions should be successfully resolved.



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- CMS Investigation of HCBS Waiver:** In 2002-2003, the federal Center for Medicaid and Medicare Services (CMS) conducted an audit of DSHS's Home and Community-based Services waiver (HCBS), also known as the Community Alternative Program (CAP) waiver. This waiver program provides federal matching funds for community-based services for people with developmental disabilities who would otherwise face institutionalization. The waiver requires compliance with detailed federal standards in order to maintain eligibility for federal funding. Following its audit, CMS staff concluded there were significant non-compliance issues in DSHS's program and identified several millions of dollars for potential recovery from the department, although CMS has yet to formally assess an overpayment. Since the CMS audit, DSHS has made significant changes to its waiver programs and made necessary assurances to CMS. During this time the single CAP waiver was replaced by four smaller waivers with different criteria and services in order to make them more manageable. It remains to be seen if CMS will impose disallowances based on the findings of its evaluation.
- Changes in DDD Client Assessment:** DDD is now using a more standardized assessment tool to measure client needs. The new assessment tool then determines the level of services each client receives. All DDD clients receiving services are being reassessed to determine their needed level of services, and many are experiencing service reductions based on new assessments showing lower levels of need. As a result, there has been a significant increase in the number of administrative appeals, and Columbia Legal Services is threatening to challenge the use of the new assessment device.

# Seattle Division



## Summary of Responsibility

The Seattle SHS Division provides legal services to the Department of Social and Health Services in King County. The division consists of 25 assistant attorneys general, an administrative manager and 18 other staff including legal assistants, paralegals and other professional support staff.

## Legal Services Provided

The division provides legal representation to the Department of Social and Health Services (DSHS) in all levels of state and federal court and administrative tribunals. Approximately 85 percent of the division's caseload involves juvenile court litigation (juvenile dependency and termination of parental rights proceedings). The other types of work handled include foster care and day care licensing hearings, adult family home and boarding home licensing hearings and adult protective services guardianships.

## Numbers/Trends

During the past year, there was a 20 percent increase in the number of termination of parental rights cases and a significant decrease in the number of dependency guardianship cases. This increase is the result of a change in DSHS policy to better screen cases and obtain the most permanent plan for young children.

The number of new juvenile dependency cases remained consistent from the previous year. Overall, there has been a downward trend since 1999. This decrease may be attributed to a number of different reasons, including prevention and in-home services provided by the department.

The division remains active in the area of adult abuse, neglect and exploitation. Vulnerable adult protection remains a priority for the division.

## Significant Cases

**In re T.C.:** In a published decision, the Washington Court of Appeals, Division I, held that DSHS could not be forced through a Child in Need of Services (CHINS) petition to locate a residential community placement for a youth who was also an adjudicated sex offender. The youth filed the CHINS petition to avoid incarceration by having the department find and pay for a community placement for him. The trial court granted the petition and the Court of Appeals reversed the trial court.

**During the past year, there was a 20 percent increase in the number of termination of parental rights cases and a significant decrease in the number of dependency guardianship cases. This increase is the result of a change in DSHS policy to better screen cases and obtain the most permanent plan for young children.**

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# Spokane Division



## Summary of Responsibility

The Spokane Division provides a wide range of legal services to many agencies of state government and state institutions of higher education in Eastern Washington. Additionally, nearly all consumer protection functions for the eastern half of the state are located in the Spokane Division. The Spokane Division consists of 27 assistant attorneys general and approximately 55 additional staff, including legal assistants, paralegals, investigators, professional support staff, law students, volunteers, and other students.

**Nearly all consumer protection functions for the eastern half of the state are located in the Spokane Division.**

## Legal Services Provided

Spokane attorneys are assigned to one of four sections: Social & Health Services, Labor & Industries, the Spokane Interdivisional Section, or Torts.

**Social & Health Services:** Some of the state agencies served by our Social & Health Services Section are the Division of Children & Family Services, Division of Developmental Disabilities, Aging and Adult Services, Division of Child Support, Community Services Offices, and Eastern State Hospital. They also handle various licensing matters, including day care, foster care, boarding home, and adult family home facilities.

**Labor & Industries:** This section handles industrial insurance appeals, cases involving the Washington Industrial Safety and Health Act, and fraud cases before the Board of Industrial Insurance Appeals and in the trial courts in Spokane County and several other Eastern Washington counties. This section also provides counsel to the Worker's Benefits program and other various L&I specialty compliance boards administered by L&I.

**Spokane Interdivisional Section:** This section handles consumer protection matters, representation of institutions of higher education including Eastern Washington University, Big Bend Community College, Educational Service District 101, the three schools comprising Community College District 17, driver's licensing revocation appeals, and Labor and Personnel matters for state agencies in Eastern Washington.

**Torts:** This section represents state agencies, boards and commissions and state officials who are sued where the case arises in Eastern Washington. In addition, one attorney specializes in employment related suits. Typical tort clients include the Department of Social and Health Services, Department of Corrections, Department of Transportation, Washington State Patrol, and various institutions of higher education.

# Spokane Division

**The Spokane Division’s Consumer Protection team has, in conjunction with AARP, initiated a state-wide senior fraud education program. This training has created over 650 “Fraud Fighters” equipped to educate others regarding fraud directed at our senior citizens.**

- The Spokane Division represents the Spokane Intercollegiate Research and Technology Institute and the Eastern Washington State Historical Society.
- The division also supports major crime investigations with two senior criminal investigators who work directly with local law enforcement agencies in Eastern Washington.

## Numbers/Trends

- Increased methamphetamine usage and general drug usage in eastern Washington has impacted the type and number of juvenile court cases filed regarding child abuse and neglect, especially in the area of neglect.
- Approximately two child abuse cases are filed each working day. This trend has led to an increase in the number and complexity of cases terminating the parental relationship.
- Consumer protection calls and written complaints to the Spokane Division have increased about 15 percent to approximately 1,500 per month, focusing mainly on auto repair, auto sales, and telecommunication issues. Fraud perpetrated on seniors continues to be a focus of our efforts.
- Tort claims assigned to Spokane remain high, including several “priority” cases where the prayer for relief can be over \$1 million and/or contain an issue of state-wide significance.

## Significant Cases

- The Spokane Division’s Consumer Protection team has, in conjunction with AARP, initiated a state-wide senior fraud education program. This training has created over 650 “Fraud Fighters” equipped to educate others regarding fraud directed at our senior citizens. The division is also participating in and supporting local efforts to establish a Senior Fraud Consortium consisting of multiple agencies to globally address senior fraud.
- Information about significant cases is described elsewhere in this report under the applicable division report for substantive legal work that is handled in Spokane.
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# Tacoma Division



## Summary of Responsibility

The Tacoma Division provides a wide range of legal services to many agencies of state government. The Tacoma Division consists of 26 assistant attorneys general and approximately 28 additional staff, including legal assistants, paralegals, and other professional support staff. Our General Service staff of four provide quality reception, supply ordering, copy projects and other support to this office of 54, as well as to an additional two sections, Consumer Protection and Medicaid Fraud.

## Legal Services Provided

Tacoma attorneys are assigned to one of the three sections: Social & Health Services, Labor & Industries, and Licensing & Administrative Law.

**Social & Health Services:** Some of the divisions served by our Social & Health Services Section are the Division of Children and Family Services and Aging and Adult Services. This section also handles various licensing matters, including day care, foster care, boarding home, and adult family home facilities.

**Labor & Industries:** This section handles industrial appeals (both state fund and self insured), Washington Industrial Safety and Health Act appeals, worker fraud appeals, and crime victim compensation cases.

**Licensing & Administrative Law:** This section represents the Employment Security Commissioner in unemployment appeals in Kitsap and Pierce County Superior Courts. This section represents the Department of Licensing in appeals of license revocations or suspensions in Kitsap and Pierce County Superior Courts.

## Numbers/Trends

The Tacoma Division is partnering with the Department of Aging and Adult Services, and the Pierce County Prosecuting Attorney's Office to address concerns regarding the abuse/neglect of vulnerable adults in Pierce County. The Pierce County Prosecutor's Office has a federal grant to develop trainings for local law enforcement and deputy prosecutors in the area of abuse of vulnerable adults. The division, in partnership with the Prosecutor's Office and the department, will address the need to promote interagency cooperation in the prevention of abuse/neglect, investigation of incidents of abuse/neglect and in the prosecution of perpetrators of abuse/neglect of developmentally disabled adults and/or elders; the need for education and understanding of the roles and limitations of the department, law enforcement and the

**The Tacoma Division is partnering with the Department of Aging and Adult Services, and the Pierce County Prosecuting Attorney's Office to address concerns regarding the abuse/neglect of vulnerable adults in Pierce County.**

- ## Significant Cases

- [illegible]



# Transportation and Public Construction Division



## Summary of Responsibility

The Transportation and Public Construction Division (TPC) represents the Washington State Department of Transportation (DOT) as it designs, constructs, operates and maintains Washington's highway system and other multi-modal transportation operations (Washington State Ferries, rail, aviation, freight transport, public transportation, etc.). Other client agencies of the division include: the Washington Transportation Commission, the Board of Pilotage Commissioners, the County Road Administration Board, the Transportation Improvement Board, the Washington Traffic Safety Commission, and the Freight Mobility Strategic Investment Board. Division attorneys also use their experience in eminent domain, contracts, construction, land use and environmental law to support the construction activities of an increasing number of other state agencies.

**The division's workload can vary depending on the level of investment in new or expanded transportation projects and the level of construction undertaken by client agencies.**

## Legal Services Provided

TPC's workload is a mix of moderate to complex litigation and client advice on a wide range of issues. In addition to a steady condemnation caseload, TPC attorneys handle construction claims and environmental litigation, both regulatory compliance and defense of hazardous waste claims, as well as land use issues that arise in connection with state projects. In addition, division attorneys handle a number of tort cases seeking recovery of property damage allegedly caused by floods and landslides. Client advice topics range from land use and environmental permitting issues to construction contracting and constitutional issues on the use of state gas tax revenue.

## Numbers/Trends

The division is currently handling 114 open lawsuits and appeals and 191 open advice files.

The division's workload can vary depending on the level of investment in new or expanded transportation projects and the level of construction undertaken by client agencies. There has been dramatic growth in the division's advice in project construction due to accelerated project planning, mega-project scoping (I-405, SR 520 Floating Bridge, Alaskan Way Viaduct, Washington State Ferries Terminal and Vessel procurement, Sound Transit, etc.), unusual environmental impacts and mitigation strategies, and new project delivery and finance methods (like design-build contracting) which present complex and novel legal questions.

The division has also seen growth in its environmental and land use practices as claims arise under the Endangered Species Act, Clean Water

## Transportation and Public Construction Division

**In 2004, division attorneys resolved 19 cases, acquiring \$27 million worth of right-of-way for DOT construction projects around the state.**

- Act, State Environmental Policy Act and National Environmental Policy Act as transportation construction proceeds. Environmental permit streamlining issues and land use requirements from a large number of local jurisdictions faced with state highway construction have also increased demands on our environmental and project litigation teams.
- The division also handles construction and real estate/environmental/land-use mediation and litigation for agencies other than DOT. Recent cases involve prison construction by the Department of Corrections, higher education construction (Evergreen State College and Eastern Washington University) and other General Administration projects.
- The division has also seen growth in its Tribal practice areas as construction projects (a ferry terminal at Edmonds and a pontoon construction dock near Port Angeles) raise important archaeological and project management issues under the federal National Historic Preservation Act.

### ● Significant Cases and Their Impact

- **DOT Condemnations:** In 2004, division attorneys resolved 19 cases, acquiring \$27 million worth of right-of-way for DOT construction projects around the state. The division's condemnation caseload is expected to continue to increase with the new transportation finance package developed during the 2003 legislative session.
- **Stafford Creek Correctional Center:** The division is currently working with specially appointed assistant attorneys general to prepare for \$25 million construction claims from a prime contractor and 12 sub-contractors regarding change orders and terms in a prison construction contract, together with damage claims by DOC. Arbitration is scheduled for December 2004.
- **WSDOT v. Seacoast Towing:** Division attorneys have worked with DOT to recover nearly \$1 million in taxpayer funds used to repair the SR 520 floating bridge after a barge hit it a couple of years ago. The case is currently on appeal to the 9th Circuit Court of Appeals after a decision by a federal trial court limiting DOT's recovery to the value of the barge.
- **Construction Contract Claims:** Division attorneys devote considerable time to avoiding and resolving claims and bid protests from contractors on highway construction projects. Nonetheless, each year a number of such claims are presented by contractors seeking recovery for cost overruns. Many claims are settled either through negotiations or as a result of a dispute review board hearing, but only after substantial preparation for the possibility of litigation.

### ● Major Issues/Events

- **Environmental Issues:** As DOT projects continue to impact both the natural and built environment, the division continues to see growth in its permit-related advice and litigation caseload. DOT has a collaborative

## Transportation and Public Construction Division

working relationship with the Washington State Department of Ecology and lawyers for each assist that effort regularly.

**Washington State Ferries:** Division attorneys continue to work collaboratively with the Washington State Ferries, U.S. Coast Guard, the Washington State Patrol, and other agencies to assess federal security guidance for passengers, terminals and vessels in light of state constitutional protections. Ferry procurement, terminal construction, labor issues and environmental matters associated with ferry design and operation have also seen increased demands for legal services.

**Accelerated Projects/Changing Project Delivery:** With the current pressing demands to deliver the transportation projects funded in the 2003 legislative session, and the need for expansion and maintenance projects to happen quickly to maximize economic stimulus and restore needed infrastructure, the division has advised project managers on a wide variety of mega-project design-build issues, risk allocation, innovative construction claims processes, unique financing arrangements, ballot measure impact (I-776), and multi-party operations initiatives with private and public parties (Sound Transit).

# Utilities and Transportation Division

**The division represents the commission's staff in rate proceedings and other regulatory actions before the commission. It also assists in the disposition of more than 1900 formal filings considered annually by the commission.**

## ● Summary of Responsibility

- The Utilities and Transportation Division provides legal services to the Washington Utilities and Transportation Commission (WUTC or commission).
- The WUTC regulates the rates, services, and practices of a wide range of services, including: telecommunications (but not wireless, Internet, or cable companies), electricity and natural gas, solid waste collection, water, pipelines, railroad carriers and facilities, in-state household movers, private ferries, and bus companies. New market conditions, technology, federal and state laws, and consumer expectations make for an ever-changing policy and legal landscape.

## ● Legal Services Provided

- The division principally handles regulatory litigation. The division represents the commission in court, both in appeals from commission decisions and in original actions, as well as in proceedings before various federal agencies, including the Federal Energy Regulatory Commission (FERC) and the Federal Communications Commission (FCC). The division represents the commission's staff in rate proceedings and other regulatory actions before the commission. It also assists in the disposition of more than 1900 formal filings considered annually by the commission.

## ● Numbers/Trends

- The division currently is handling 22 cases in state and federal courts and 12 formal federal administrative agency cases (not including participation in rulemaking proceedings before the FCC and FERC). In addition, the division is handling a large number of administrative cases before the WUTC, ranging from complex rate and pricing proceedings to smaller cases impacting only a few consumers. The vast majority of matters before the commission are resolved without formal adjudication. They are either non-controversial or resolved through negotiation or other alternative dispute resolution processes. Many matters are resolved at the commission's regularly scheduled open meetings.

## ● Significant Cases

- **Rate Cases:** There are several major rate cases pending before the WUTC. The following companies are seeking an increase in rates: Puget Sound Energy (\$256 million), Avista Corporation (\$26 million), PacifiCorp (\$27 million), and Verizon Northwest (\$240 million).

## Utilities and Transportation Division

**Verizon's Access Charges:** The commission ruled on a complaint brought by AT&T against Verizon's access charges. Access charges are fees that long-distance companies pay to local exchange companies for use of the local exchange company's telephone network to originate or terminate long-distance calls to customers. AT&T claimed that Verizon's access charges were excessive and discriminatory. After a hearing, the commission ordered Verizon to reduce its access charges by \$32 million. Verizon petitioned for judicial review of the order and sought a stay, which was denied by the Superior Court. Verizon unsuccessfully challenged the denial of the stay at the Court of Appeals and state Supreme Court. Briefing on the merits is underway at the state Supreme Court.

**PacifiCorp's Rate Plan:** The commission issued an order amending a prior order that established a five year Rate Plan for PacifiCorp. In its amendment order, the commission allowed PacifiCorp to file a general rate case before the expiration of the Rate Plan's five year moratorium. The Public Counsel Section of the Attorney General's Office is challenging the commission's decision at the Court of Appeals.

### Major Issues/Events

**Energy Regulation:** FERC and some members of Congress have proposed major electricity system restructuring which would destabilize this critical industry and put Washington consumers at risk. FERC has proposed "Standard Market Design" rules which would require all states to participate in a centrally designed and uniformly imposed electricity restructuring. This restructuring would ignore distinctive state and regional policies and circumstances. The Office of the Attorney General and the commission have independently worked against Standard Market Design rules through comments to FERC and through communications with Washington's Congressional delegation.

**Competition in Telecommunications Markets:** The political and legal environment in telecommunications has been in constant flux since pro-competitive policies were enacted through the 1996 federal Telecommunications Act. The law required existing local telephone companies to open their networks to competitors. The FCC has interpreted, and re-interpreted, the law in different fashions in response to a number of lawsuits and court decisions. This uncertainty has made it difficult for new providers to implement business plans that rely on leasing all or parts of the existing, incumbent telephone network. These areas of contention and uncertainty affect the WUTC's role and workload in regulating service provider interactions. Most large businesses have a choice of providers, but competition has yet to reach residential and some small business markets. The increasing popularity of broadband Internet access has added to the complexity of the WUTC's work. Uneven deployment of broadband has lead to calls to consider it a "basic" service to be made universally available. Broadband also enables new services, such as Internet-based telephone service, that do not neatly fit the existing legal definitions.

The U.S. Congress is considering rewriting the Telecommunications Act of 1996. Areas of focus include federal jurisdiction, clarification of

**The Office of the Attorney General and the commission have independently worked against Standard Market Design rules through comments to FERC and through communications with Washington's Congressional delegation.**

## Utilities and Transportation Division

- competitive requirements and classification of new technologies such as Internet-telephony. This federal rewrite could require changes to business and residential consumer protections and programs at the state level and significantly impact the workload of the division.
- Pipeline Safety:** The WUTC Pipeline Safety Program has been inspecting intrastate natural gas pipelines since 1955; however, the state's role and status in pipeline safety grew significantly following the fatal 1999 explosion of a federally-regulated petroleum pipeline in Bellingham, Washington. The state Legislature responded with the Washington State Pipeline Safety Act of 2000, which increased state pipeline safety requirements and directed the WUTC to seek the ability to serve as the federal agent in the regulation of interstate pipelines. The federal Office of Pipeline Safety granted the WUTC interstate agent status in 2000. In 2002, the WUTC began inspecting interstate pipelines as well. The WUTC staff fulfills nearly all pipeline safety tasks in Washington including incident investigation, public communication and outreach, and liaison with FERC on pipeline issues. In total, the WUTC pipeline safety program is responsible for 21,000 miles of pipeline within the state of Washington. The WUTC's enhanced efforts and increased enforcement activity in the area of pipeline safety have significantly impacted the workload of the division.

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# **Professional Services**

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# Administration Division

**Budget annually processes 3,000 legal services billings to state agencies, boards and commissions. These billings provide revenue to support legal operations of approximately \$96 million annually.**

## ● Summary of Responsibility

- The Administration Division provides nonlegal services for the Attorney General's Office and is divided into six offices: Fiscal and Budget, Human Resources, Facilities, Information Services, Law Library and Public Affairs.

## ● Services Provided

- Support services include centralized budgeting and accounting, personnel and training, library resources, planning and technical support for the office's computer systems, management of the office's buildings, internal and external communications and general office administration.

## ● Numbers/Trends

- **Fiscal/Budget:** The Fiscal Office is divided into four sections -- Accounting Services, Budget, Payroll and Purchasing.
- Accounting Services annually processes approximately 162,500 transactions for vendor payment and employee travel reimbursement.
- Budget annually processes 3,000 legal services billings to state agencies, boards and commissions. These billings provide revenue to support legal operations of approximately \$96 million annually. In order to bill client agencies, approximately 9,000 staff timesheets are processed each year. The unit monitors approximately 165 client budgets. In addition, the unit provides expenditure and revenue monitoring and support for 69 separate divisions within the AGO. The unit also prepares and submits approximately 100 fiscal notes each biennium.
- Payroll processes a semi-monthly payroll for approximately 1,225 employees (including work-study students and law clerks) totaling \$2.62 million, or an annual total of about \$62.7 million. The unit also processes an average of 2,900 leave slips per month and an average of over 34,800 per year. Over 1,788 timesheets are processed annually for part-time and work-study employees (this figure does not include times sheets for volunteers).
- Purchasing processes approximately 750 field/purchase orders annually. They also process 3,000 invoice vouchers for other types of purchases. The Supply Center takes advantage of volume purchases which saves the agency over \$2,000 annually.
- **Human Resources Office:** The Human Resources Office received and processed approximately 1,039 applications for employment in 2004.

## Administration Division

More than 540 applications were submitted for attorney positions, while approximately 408 applications were received for law clerk positions. From the applications received, the office appointed approximately 7 attorneys, made offers to 8 third-year law students for 2005 and made 40 offers for law clerk positions. Approximately 129 appointments were made into Washington General Service in 2004.

Training staff in the Human Resources Office coordinated 370 classes in 2004, with an approximate attendance of 6,635. The 370 classes included 37 continuing legal education courses with 2,504 participants; 25 specialized classes for professional staff on topics such as Advanced Research and Workplace Violence; and 18 management/supervisory classes for the attorney manager and lead professional staff. Training classes utilizing in-house expertise also included 69 computer technology classes, 86 library research/legislative history classes, 30 fiscal related classes, 5 safety and wellness classes, 17 sexual harassment and prevention classes, which included 10 management related classes. Fourteen divisional specific classes were also offered for 650 employees. Two hundred employees completed online mandatory courses in HIPAA and Ethical Standards. A State-County-Tribal Justice Summit was also held for tribal leaders, law enforcement, tribal counsel, county and state officials and prosecutors. Most of the training in the Attorney General's Office is conducted by in-house experts resulting in a low cost to the agency of approximately \$15 per participant.

In 2004, an additional 1,049 employees participated in training classes outside the Attorney General's Office, including electronic learning (e-learning). Sixteen staff participated in the tuition reimbursement program which reimburses them for courses taken at colleges and universities.

The Human Resources Office manages a highly successful peer-driven employee recognition program for tenure and outstanding achievement. In 2004, the Attorney General recognized 44 employees for their extraordinary contributions to the office in fulfilling its mission, and 175 employees were recognized for their length of service to the state.

**Facilities:** The Attorney General's Office designs, leases and operates 19 facilities across the state. AGO staff members are also housed with client organizations at six locations including major universities, state agencies and regional juvenile detention facilities. Together they house nearly 1,200 employees at an annual lease cost of \$12 million.

In addition to buildings, the Facilities office is responsible for:

- Furniture purchases and moves;
- Agency safety and security, including Homeland Security;
- Hazard Mitigation planning and preparation; and
- Sustainability planning and reporting.

**Information Systems:** The office network contains 56 Compaq servers with a total storage capacity of 6.5 terabytes. Currently there are over two million user files maintained on the networks that use 2.9 terabytes of the office's server capacity. The network experienced a 99 percent uptime last year.

**Currently there are over two million user files maintained on the networks that use 2.9 terabytes of the office's server capacity. The network experienced a 99 percent uptime last year.**

## Administration Division

**Working with the Ecology Division, the unit created a new web site providing background information, legal documents and other material pertaining to the state's various legal efforts to ensure that cleanup at the Hanford Reservation continues on schedule.**

- The ISD Customer Support Center processed 13,228 contacts for service last year.
- ISD provided 76 classes, offering 14 different technical training courses, to 608 students in 2004.
- In 2003, ISD blocked approximately 500,000 intrusion attempts at its firewall each month. In 2004 ISD blocked approximately 17,107,918 intrusion attempts at its firewall each month.
- The AGO e-mail system has 2,357 mailboxes currently containing nearly 20 million messages.
- There were 104,000 virus infected e-mails blocked in 2004.
- There are 9.4 million agency files stored on the AGO network and ISD currently manages 3 terabytes of agency data.
- 30,865 matters have been added in the Office's Case Management System in 2004; 42,847 Calendar Events were also posted to the system bringing the total posted calendar events now in the system to 535,827.
- ISD processed 1,088 separate technology acquisition requests in 2004.
- ISD installed over 300 new PCs and notebooks for AGO staff in 2004.

• **Library:** The Law Library supports the legal staff with their research and reference needs. This year the law library completed 188 legislative history projects, answered 2,827 reference questions and fulfilled 41 interlibrary loans requests. Although there are now 927 users of Westlaw, the usage costs are down for the third year due to monthly trainings on efficient usage. There is a trend towards less costly access to court records. The AGO now has 216 users of the state Judicial Information System.

• **Public Affairs:** The Public Affairs Unit worked with the Consumer Protection and Information Services divisions to implement a new and improved search engine for the Attorney General's web site.

• Working with the Ecology Division, the unit created a new web site providing background information, legal documents and other material pertaining to the state's various legal efforts to ensure that cleanup at the Hanford Reservation continues on schedule.

• Public Affairs updated and distributed a brochure explaining the basic functions of the Attorney General's Office, as well as providing contact and other information.

• The unit launched a new online constituent correspondence form designed to provide better service and information to citizens who communicate with the office.

• In addition, Public Affairs:

- Prepared and distributed approximately 60 news releases;
- Responded to an average of eight media calls each day;
- Researched and wrote an average of four major Attorney General speeches each month;

## Administration Division

- Conducted six media trainings;
- Responded to approximately 185 constituent messages per month; and
- Provided graphic design and webmaster services to the office.

### Major Issues/Events

**Back Office Upgrade Project:** This project will upgrade all file servers to the current versions of the Microsoft BackOffice suite of software products. By updating the AGO network systems the AGO moves into compliance with the software standards set by the Washington State Information Services Board. This positions the office to join the state's shared statewide network.

**Electronic Court Filing:** The office developed electronic filing (e-filing) business practices to convert legal documents to the Portable Document Format (PDF) required for e-filing in U.S. Western District Court. Adobe software licenses were installed at each division location and on-site training and documentation was provided.

**CMS Document Repository and Agency Brief Banks:** The agency has implemented an agency-wide brief bank using Microsoft Sharepoint and the agency's enterprise Case Management System. This service allows attorney work product (briefs, advise, memos, letters, etc.) to be "published," versioned, indexed, key-word searched, and retrieved from any office location across the AGO network. This project is a crucial first step in moving the agency towards comprehensive electronic file management business practices which will include such things as the integration of digital scanners, electronic court filing and notification, electronic mail archiving, and browser-based electronic file management.

**Consumer Protection Document Tracking Repository:** Consumer Protection staff and volunteers are now able to scan paper documents and link them to the electronic records in the Consumer Affairs Tracking System (CATS) through a Microsoft Sharepoint document repository. This allows a consumer complaint to be processed and accessed completely in an electronic format.

**Managed Print Services:** The office has established a comprehensive print services program with IKON Office Solutions. The service covers document copying, printing, faxing and scanning. The service standardizes document reproduction devices across the office and operates on a "cost per impression" basis that encourages efficient use of resources. The agency expects to save tens of thousands of dollars in print costs with this managed print solution.

**Personnel Upgrade Projects and the SAP/HRMS Integration Project:** These two projects prepare the agency's existing business systems to seamlessly integrate with the implementation of the Department of Personnel's new Human Resource Management System (SAP/HRMS). Improvements to business functionality are a fully modernized personnel

**The service standardizes document reproduction devices across the office and operates on a "cost per impression" basis that encourages efficient use of resources. The agency expects to save tens of thousands of dollars in print costs with this managed print solution.**

## Administration Division

**The goal of the program was to make the most of staff resources within the agency and to respond to workload issues in the most economic and resourceful manner possible.**

- system that includes online access for state managers doing routine personnel tasks and for state employees who wish to review, and to some degree, self-service their own personnel records.
- **Phone Replacement Project:** The current voice systems for the Attorney General's Office are 25 years old and prone to failure. The company that produced these systems is no longer in business and the systems need to be replaced. The AGO is also co-locating five of its Olympia-area offices to a large new building in Tumwater and this move will include the installation of a new telephone system. Potential phone system replacement options include a fully converged voice and data network on the existing AGO data network (referred to as Voice over Internet Protocol or 'VoIP') or a hybrid system that uses existing Private Branch Exchange technologies with VoIP. The agency is currently conducting a feasibility study to identify the most cost effective solution.
- **Resource Sharing Program:** The Attorney General's Office established the Resource Sharing Program in the early spring of 2002 in response to state budget cuts. The goal of the program was to make the most of staff resources within the agency and to respond to workload issues in the most economic and resourceful manner possible. The committee continues to respond to requests received from divisions for staffing assistance state-wide for office assistant senior, legal secretary, and paralegal positions.
- **Recruitment Challenges:** Recruitment for highly skilled legal secretaries continues to be a challenge for the Attorney General's Office. Qualified legal secretaries are in short supply and in high demand and our agency competes for this limited resource with our private sector counterparts. Two of the tools used by the Attorney General's Office to ease this recruitment issue have been in-house training programs and the application of assignment pay (in Seattle).
- Mid-level managers are leaving their positions to retire and there is a shortage of internal candidates with institutional knowledge to readily move into these positions. The Lead Academy is one of the programs that has been developed to help prepare staff for these important roles. The first training session for leads was held in October 2004. The next session is tentatively scheduled for March 2005.
- **Civil Service Reform:** The Attorney General's Office continues to be very involved in all aspects of Civil Service Reform. This major overhaul of the state's personnel system is taking a lot of time to restructure a system that has been in place for more than 40 years. The Attorney General's Human Resources Office and Information Services Division are working closely with the Department of Personnel's staff to ensure our information services systems will be ready to go when the state is ready for final conversion. Staff has also participated on civil service reform development committees in the areas of classification, compensation, rule making, recruitment, testing and training deployment. The office will continue to participate in the on-going effort to implement civil service reform and continue to provide the Department of Personnel with input as opportunities arise. The Human Resources Office will also continue to communicate these changes as they occur to agency staff.

## Administration Division

**Legislative History:** The Law Library was recently approved to load legislative history research projects into the Sharepoint Document Repository. This initiative, to digitize legislative history projects and make them searchable through Sharepoint, will improve research accessibility and efficiency for the AGO.

**Training Classes:** Training classes this year consisted of Internet-based instruction on efficient use of Westlaw, West Check, Keycite, and WAG-O-Cat and seminars on researching Washington Legislative History and using Leglink. 517 staff attended 77 training classes which were delivered or coordinated by the Law Library in 2004.

**Safety Assessment:** The office completed a safety assessment of all offices in 2002. The goal was to bring all offices up to basic safety levels.

**Thurston County Offices:** The agency continues its long-range goal to consolidate its Thurston County offices. Plans are being finalized to consolidate eight divisions from four locations into a new facility being constructed in Tumwater. The consolidation will take place in 2005 and 2006.

**Hazard Mitigation Plan:** This year the Facilities Office developed a Hazard Mitigation Plan to prepare agency facilities to face natural disasters. In addition, a Sustainability Plan was adopted to reduce waste and energy consumption and to alter employee attitudes toward the environment.



# Policy and Government Relations Unit

**The unit coordinated a two-day pilot training in June 2004 on the issue of officer-involved domestic violence. The training was the AG's latest effort to bring together stakeholders to better understand and respond to domestic violence incidents involving a law enforcement officer.**

## ● Services Provided

- The Policy and Government Relations Unit helps develop AGO policy initiatives and legislation. The unit also serves as the AGO liaison with stakeholders, the Legislature, Congress and the National Association of Attorneys General (NAAG).

## ● Initiatives

- **Safety Net:** The Policy and Government Relations Unit continued to lead the Attorney General's public education efforts on Internet and high tech crime. As part of a comprehensive Internet-safety campaign entitled Safety Net, the Attorney General visited 27 middle schools in 24 communities and made presentations to approximately 2,500 students, several parent and civic organizations, and met with nearly every law enforcement agency in Washington.
- **Risk Management Reviews:** The Policy and Government Relations Unit continued to implement the AGO's critical events policy created in 2003. In 2003 and 2004, the unit conducted a risk management audit, visiting 22 divisions in 12 cities and interviewing all the 200-plus supervisors and about half of the other employees for a total of 531 audit meetings. These meetings covered tort liability, calendaring, security, personnel issues, training, public disclosure, and handling of money, state cars, and confidential documents. Based upon recommendations made to division chiefs, their deputies, and the AGO Management Team, several improvements were implemented.
- **Officer-Involved Domestic Violence Training Pilot:** The unit coordinated a two-day pilot training in June 2004 on the issue of officer-involved domestic violence. The training was the AG's latest effort to bring together stakeholders to better understand and respond to domestic violence incidents involving a law enforcement officer. This was in response to the April 2003 incident in which Tacoma Police Chief David Brame shot and killed his estranged wife Crystal before committing suicide.
- Over 70 prosecutors, law enforcement, 911 dispatch officials, risk managers, and community based domestic violence victim advocates from three counties discussed how the issue affects their community and worked through four complex scenarios involving mandatory reporting, victim safety and confidentiality, recruitment and hiring, and weapons. A summary of the training and critical issues from the scenarios was shared with all law enforcement agencies in the fall.
- **Domestic Violence Resource Teams:** In October, the Attorney General created and recruited an office-wide domestic violence resource team. The



## Policy and Government Relations Unit

team consists of four individuals specifically chosen to serve as resources for AGO employees who request assistance or information related to domestic violence. The team will be trained to recognize issues and refer victims to community organizations for counseling and other services.

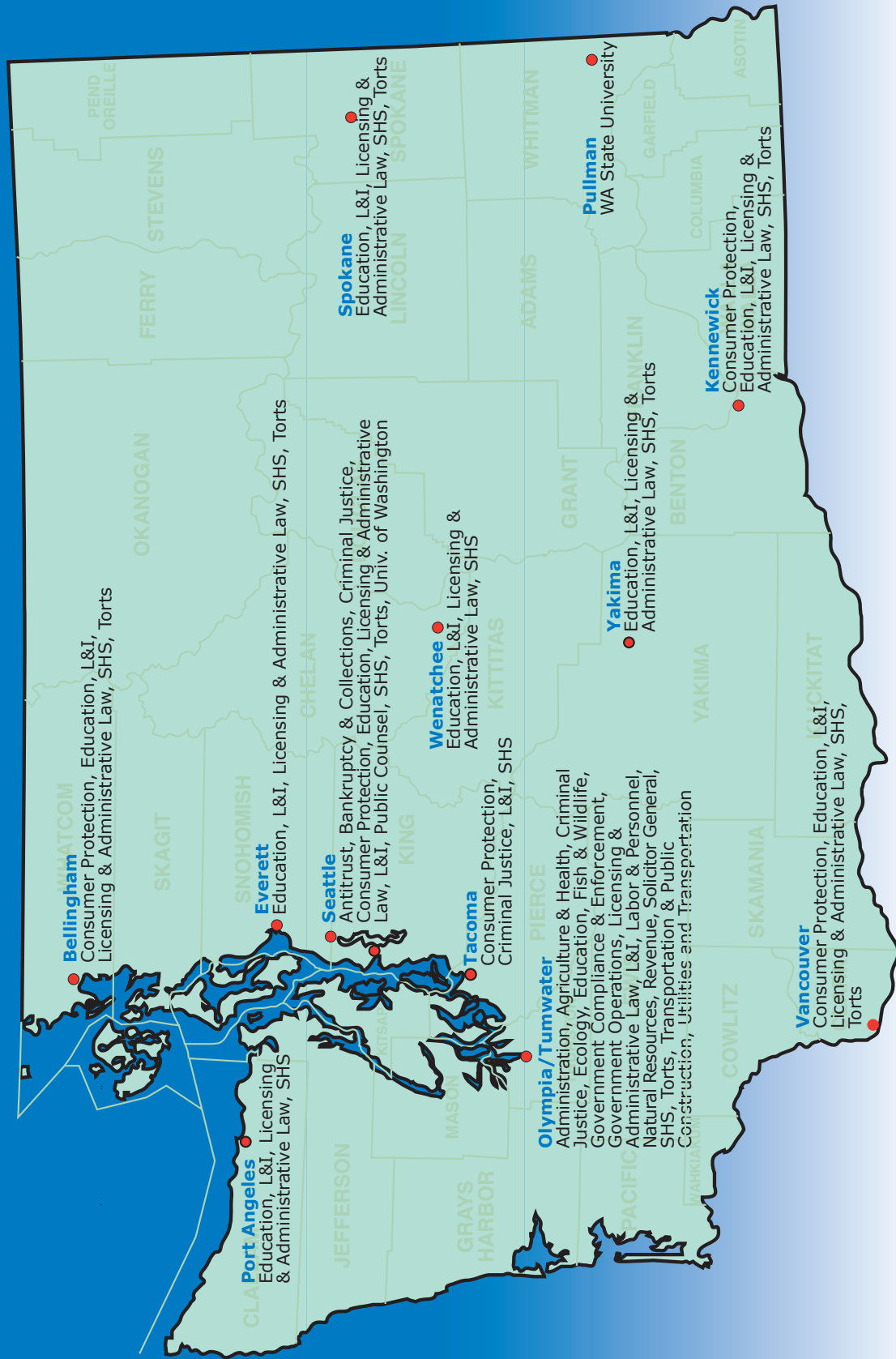
**NAAG Webcast:** As the host of the 2004 NAAG Internet Law Conference, the Policy and Government Relations Unit produced the first ever Internet Law Conference live over the Internet. The "webcast" was devised to increase convenience for AGs and staff and save money on travel costs. This year, 38 states participated in the two-day conference compared to 22 that attended the 2003 conference held at the University of Washington. From their desktops, participants were able to see and hear live presentations and panel discussions, view accompanying video and graphics and ask questions either through email or over the telephone. The webcast originated from Washington's Department of Information Services studios in Olympia and was financed by a grant from the NAAG Mission Foundation.

## 2004 Legislation

**Officer-Involved Domestic Violence:** The Attorney General's Office actively supported SB 6161, which requires law enforcement agencies to develop policies for addressing domestic violence when a law enforcement officer is involved. Policy and Government Relations Unit staff participated in the task force that developed the legislation. We are working with the Washington Association of Sheriffs and Police Chiefs to draft a model policy and help communities adopt and implement it.

**AGO Budget:** The office was successful in obtaining passage of its budget, which included appropriations for the violent videogame litigation, Pacific Sound Resource litigation and settlement, Mader case settlement (part-time faculty benefits), licensing caseload increases, Hallet case (inadequate health care at Washington Corrections Center for Women) wrap up, restoration of funding for HITS assistance to local governments, and Spokane County unfunded mandates litigation.

# Attorney General's Office Locations



Washington State December 2004